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Supreme Court of the United States

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL., APPELLANTS,

vs.

CHARLES PAUL, DIRECTOR OF DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL.

No. 49

CHARLES PAUL, DIRECTOR OF DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL., APPELLANTS,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. 45 FILED NOVEMBER 20, 1961
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SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

Civil Action No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

v.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

COMPLAINT FOR INJUNCTION TO RESTRAIN ENFORCEMENT AGAINST PLAINTIFFS OF SECTION 792 OF AGRICULTURAL CODE OF CALIFORNIA—Filed November 13, 1957

Florida Lime and Avocado Growers, Inc., a corporation, and South Florida Growers Association, Inc., a corporation, plaintiffs, complain of the defendants W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, and for their cause of action allege as follows:

I.

The plaintiff Florida Lime and Avocado Growers, Inc. was originally organized under the laws of Florida in 1937 as a cooperative association and in 1956 was reorganized as

[fol. 2] a corporation for profit, with principal place of business in Princeton, Florida. The plaintiff South Florida Growers Association, Inc., was organized as a corporation under the laws of Florida in 1953 and has its principal place of business in Goulds, Florida. The same business was previously operated as a partnership by Harold E. Kendall and Elizabeth H. Kendall, under the trade name of Florida Growers Association, from 1939 to 1953. Both plaintiffs are engaged in the business of marketing avocados grown in Florida, also in the growing of avocados.

II.

The defendant W. C. Jacobsen is the executive officer of the State of California charged with the duty of conducting the state government's Department of Agriculture; the defendant Goodwin J. Knight is governor of the State of California; the defendant Edmund G. Brown is attorney general of the State of California.

III.

The matter in controversy is the right of the plaintiffs to market Florida avocados in California free from restriction of section 792 of the Agricultural Code of California, and plaintiffs' action is within the jurisdiction of the court by virtue of section 1331 of the Judicial Code (28 USC section 1331) in that the controversy arises under the Constitution of the United States, *viz.;* article I, section 8, clause 3, vesting in Congress the power to regulate commerce with foreign nations and among the states, and the Fourteenth Amendment, section 1, prohibiting any state from making or enforcing any law which denies to any person within its jurisdiction the equal protection of the laws. As to each of the plaintiffs, the matter in controversy exceeds the value of $3,000, exclusive of interest and costs.

IV.

The action is within the jurisdiction of the court, also, [fol. 3] under section 1337 of the Judicial Code (28 USC section 1337) in that the controversy arises under an Act

of Congress regulating commerce, namely, the Marketing Agreement Act of 1937, as amended (7 USC section 601 et seq.).

V.

Said Marketing Agreement Act of 1937 was enacted to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, by means of marketing agreements between the Secretary of Agriculture of the United States and the producers and handlers of such commodities and the orders and regulations made by the Secretary to carry out such agreements and to effectuate the purposes of the Act, including orders and regulations to establish and maintain minimum standards of quality and maturity and such grading and inspection requirements for the enumerated agricultural commodities as will effectuate the orderly marketing thereof. (Declaration of policy—7 USC section 602, as amended August 1, 1947.)

VI.

Pursuant to the provisions of the Marketing Agreement Act of 1937 and in accordance with the procedure prescribed, a marketing agreement with respect to the avocados grown in South Florida was made between the Secretary of Agriculture of the United States and the producers and handlers of avocados in the designated counties of Florida, effective upon publication in the Federal Register on June 11, 1954 of the Secretary's marketing order No. 69. (19 FR 3439; 7 CFR part 969, pp. 119-131 and Suppl. pp. 14-18; exhibit A hereto attached.)

VII.

Said marketing order No. 69 was made by the Secretary of Agriculture upon findings, among other, that 80% to 90% of Florida avocados are sold in markets outside the state; [fol. 4] that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce, or directly affects such commerce; that the growers and handlers of Florida avocados have been accustomed to sell the entire production in fresh channel

markets, including fruit which is immature and otherwise of poor quality, and this has tended to reduce the demand and the prices for Florida avocados; that the situation can be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Findings and decision of Secretary on proposed marketing agreement—April 24, 1954, 19 FR 2418, and May 14, 1954, 19 FR 2784; also order No. 69, section 969.0(5).)

VIII.

Said marketing order No. 69 has remained continuously in force since June 11, 1954. It provides that the Secretary of Agriculture shall issue regulations to carry out the marketing agreement and to effectuate the declared policy of the Marketing Agreement Act, including prohibition of the handling of any size or sizes of any variety or varieties of avocados grown in the production area, or the handling of avocados which do not meet such quality and maturity standards as the Secretary may prescribe. (Sec. 969.51.)

IX.

Said order further provides for the establishment of an Avocado Administrative Committee to serve as the agency of the Secretary of Agriculture in the administration of the program to be carried out under said order. The committee consists of nine members, five growers and four handlers of avocados in the designated production area, nominated and appointed in the manner specified in said order. The powers and duties of the committee include the investigation of growing and maturity conditions of avocados in the pro-
[fol. 5] duction area, research relating to the determination of maturity and grade standards for avocados; making recommendations to the Secretary of regulations for the handling of avocados grown in the designated area; and generally, aiding in the administration and enforcement of the marketing agreement and order.

X.

Since June 11, 1954 the Secretary of Agriculture has issued numerous regulations prescribing quality and maturity standards for the avocados handled under said marketing order and prohibiting the handling and marketing of avocados which do not meet the prescribed quality and maturity standards. The quality and maturity regulations for the 1957-1958 South Florida avocado crop adopted under said marketing order No. 69 became effective upon publication in the Federal Register as follows: May 23, 1957—22 FR 3652; June 17, 1957—22 FR 4251; July 22, 1957—22 FR 5679; August 26, 1957—22 FR 6746; September 9, 1957—22 FR 7173; September 16, 1957—22 FR 7357; October 12, 1957—22 FR 8117. Said regulations set forth the earliest permitted shipping dates for each of the varieties of avocados grown in South Florida: an "A" date, for each variety, when fruit of specified minimum weight or diameter may be shipped; a later "B" date, when fruit of somewhat lesser weight or smaller diameter may be shipped; a still later "C" date, with minimum weight or diameter of the fruit then permitted to be shipped; a "D" date, when avocados of the named variety may be shipped regardless of attained weight or diameter. A summary of said 1957-1958 shipping dates for 45 named varieties of avocados grown in South Florida, also for un-named varieties, prepared by the Avocado Administrative Committee, is hereto attached and marked exhibit B.

[fol. 6] XI.

The Secretary of Agriculture has also issued regulations establishing grade standards for the Florida avocados permitted to be shipped in interstate commerce under said federal marketing order No. 69, *viz.*: regulation issued May 21, 1955 (20 FR 3557) and amended regulation issued April 13, 1956 (21 FR 2409, exhibit C hereto attached), referring for authorization to section 608c of the Agricultural Adjustment Act of 1933, reenacted as part of the Federal Marketing Agreement Act of 1937. Four grades are specified, No. 1 grade, No. 2 grade, a combination grade (not less than 60% of No. 1 grade avocados and balance

No. 2 grade, in each container), No. 3 grade. In each of said grades, among other qualities, the avocados are required to be mature but not overripe, and all avocados failing to meet one of said grade standards are condemned as culls. By supplementary regulation published May 24, 1957 (22 FR 3652), no Florida avocados under No. 2 grade may be shipped in interstate commerce during the crop season from June 3, 1957 to April 30, 1958.

XII.

All avocados handled under said marketing order No. 69 are inspected by the joint inspection service of the State of Florida and the federal government and no load of avocados may lawfully depart from the state without presentation of a certificate of such inspection, showing requisite quality and maturity under the said marketing order.

[fol. 7]

XIII.

At all times since the Florida 1954-55 crop season for avocados, plaintiffs have been duly registered handlers of Florida avocados under said marketing order No. 69. The current certificate of the plaintiff Florida Lime and Avocado Growers, Inc. as such registered handler of avocados was issued by the Avocado Administrative Committee on April 9, 1957. The like certificate of the plaintiff South Florida Growers Association, Inc. was issued on the same date. Both certificates are for the period from April 1, 1957 to March 31, 1958.

XIV.

In each of the crop years since 1954-1955 the plaintiff Florida Lime and Avocado Growers, Inc. has picked, packed and distributed approximately 60,000 bushels of avocados, of average value (f.o.b. Florida) of about $275,000. In each of said crop years the plaintiff South Florida Growers Association, Inc. has handled approximately 35% to 40% of the avocados grown and marketed in Florida, viz.: 1954-55—166,818 bushels; 1955-56—206,308 bushels; 1956-57—144,048 bushels; 1957-58, to October

23, 1957—74,500 bushels, and estimated for the remainder of the 1957-58 season 100,550 bushels. The estimated value of the avocados handled and to be handled by said plaintiff in the 1957-58 season is approximately $800,000. Approximately 95% of the avocados handled by plaintiffs are for out of state shipments, on sales in part for plaintiffs' own account and in part for the account of numerous other growers of avocados in South Florida.

XV.

The commercial production of avocados in the United States is concentrated in California and Florida. California, at the present time, is both the largest producer and the largest consumer of avocados. However, there are four or five months of the year when the supply of Florida [fol. 8] avocados exceeds that of California. In the 1955-1956 crop season, when California marketed approximately 1,187,500 bushels of avocados and Florida 506,282 bushels, the Florida supply exceeded that of California in the months of October, November, December and January, and in the 1956-57 season, when the California supply was approximately 575,000 bushels as against 360,927 bushels for Florida, the Florida shipments exceeded those of California in the months of October, November, December, January and February. Thus, during the fall and winter months, when the California supply of avocados is at its lowest ebb, and when also there is a peak consumer demand for avocados because of redueed supply of other fresh fruits, melons and vegetables, California is an especially favorable market for Florida avocados. Also, with the great influx into California of people from the eastern states, where they were consumers of Florida avocados, there is substantial demand in California for the larger low calorie and mild flavored Florida avocados in preference to those grown in California.

XVI.

Plaintiffs are now constantly receiving offers to purchase Florida avocados from dealers in California, but cannot avail themselves of such offers without prohibitive risk of loss if the defendants are permitted to continue to enforce

section 792 of the Agricultural Code of California, pursuant to which no avocado may be marketed in California if it has less than 8% oil content.

XVII.

Chapter 2 of division V of the Agricultural Code of California prescribes standards for fruits, nuts and vegetables that may lawfully be marketed in the state. With respect to avocados, the prescribed standard is as follows:

[fol. 9] "Sec. 792. Avocados.

(*Freedom from defects: Tolerance.*) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(*Definition.*) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(*Oil content.*) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8% of oil, by weight of the avocado excluding the skin and seed."

XVIII.

Section 782 provides that chapter 2 shall be enforced by the Director of Agriculture, and by the commissioners of each county of the state, their deputies and inspectors, under the supervision and control of the director.

XIX.

Section 784 of chapter 2 provides:

"Sec. 784. *Preparation, etc., of non conforming fruits, nuts or vegetables.* It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

[fol. 10]

XX.

As to the containers of avocados, section 788 provides that the standards for containers of fruits, nuts and vegetables prescribed by the Agricultural Code of California are not applicable to containers established as standard by the applicable laws or regulations of the United States. No like provision is contained in the Agricultural Code of California with respect to the quality standards for avocados established by the laws or regulations of the United States.

XXI.

Other sections of said chapter 2 provide for enforcement of the declared standards by condemning non-complying fruits, nuts and vegetables as public nuisances, subject to seizure and destruction in actions to abate such nuisances (section 785), by imposition of penalties in civil actions brought by the Director of the Department of Agriculture (section 785.6), by arrest for transportation of fruits, nuts and vegetables in violation of said chapter (section 786), by making the violation of any of the provisions of said chapter a misdemeanor punishable by fine or imprisonment, or both (section 831).

XXII.

The avocados grown in Florida trace back to plants found in the tropical lowlands of the West Indies and Guatemala; the California avocados come primarily from plants originally found in the colder and less humid regions of Mexico and Guatemala. The Florida avocados are grown in warmer and more humid areas than in California; the Florida fruit is generally much larger than the California fruit, with higher water content and much lower fat or oil content. Some of the highest grade Florida avocados, when fully mature, have oil content of less than 6% and as low as 2%; the principal varieties of California [fol. 11] avocados, notably the Fuerte and Hass, attain oil content of 25% to 30%. While most of the Florida avocados come to full maturity with less than 8% oil content, the commercially dominant California varieties attain 8% oil content at a stage of growth far short of maturity.

XXIII.

Plaintiffs allege that oil content is not a scientifically valid standard of maturity or quality of avocados, particularly when applied to the avocados grown in Florida, and that the maturity of these avocados is assured by correlating the picking dates for each variety with attained weight or size, as is done by the Avocado Administrative Committee and the Secretary of Agriculture under the Florida marketing agreement aforesaid.

XXIV.

All avocados handled by plaintiffs are picked, packed and shipped for sale in compliance with the federal marketing agreement and regulations aforesaid governing the marketing of Florida avocados, and all avocados shipped by plaintiffs in interstate commerce are inspected by the joint federal and state inspection service in Florida and certified as mature and in compliance with the grade standards established by the Secretary of Agriculture pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937.

XXIV.

As above indicated, most Florida avocados, at the time of picking permitted by the applicable laws and regulations of the United States, and at the time they are certified as mature pursuant to said laws and regulations, have oil content of less than the 8% made prerequisite to sale in California by section 792 of the Agricultural Code of California. As to the Florida avocados which may possibly [fol. 12] attain the 8% oil content, there is risk that one or two of the avocados selected out of entire shipment as part of the sample batch to be tested for oil content may fail to pass the 8% test, thereby subjecting the entire load to condemnation. Because of the great distance between Florida and California and the perishable nature of the fruit, it is impracticable for a Florida shipper to recondition the load by substituting other avocados for those found to be of less than 8% oil content, leaving no practical recourse except to try to sell the rejected avocados in some other western market.

XXV.

Avocados are usually shipped by plaintiffs in truck loads of approximately 2,000 lugs, weighing 34,000 pounds and containing approximately 38,000 avocados. The value of such a load of avocados at prevailing wholesale prices, delivered in California, is $4,000 to $5,000, and if rejected for sale in California the shift to another western market entails risk of loss of a large part of the value of the entire load.

XXVI.

Because of the 8% oil content requirement of section 792 of the Agricultural Code of California, the plaintiffs have been deterred from making shipments of Florida avocados to California. Such shipments have been made with extreme caution to avoid rejection for alleged insufficient oil content and have represented only a small fraction of the avocados handled by plaintiffs. Notwithstanding such caution, shipments of Florida avocados made by plaintiffs to purchasers or consignees in California have been rejected by the defendant W. C. Jacobsen and officers of the Department of Agriculture of California under his control for the sole reason that one or more of the avocados in each load or lot failed to meet the 8% oil test. Instances of such rejected shipments made by the plaintiff Florida Lime and [fol. 13] Avocado Growers, Inc. include 1,129 lugs of avocados shipped to Safeway Stores at Oakland, California, on November 10, 1955, for which plaintiff was to receive $2,088.65, reshipped to Salt Lake City and sold at net yield to plaintiff of $711.60; 2,083 lugs of avocados shipped November 12, 1955 to Safeway Stores at Sacramento and Oakland, California, for which plaintiff was to receive $3,853.55, reshipped to Portland, Oregon, and sold at net yield to plaintiff of $1,681.03; 2,208 lugs of avocados shipped November 14, 1955 to Safeway Stores at Oakland, California, for which plaintiff was to receive $4,084.80, reshipped to Seattle, Washington, and sold at net yield to plaintiff of $1,788.20; 900 lugs of avocados shipped December 8, 1955, to Mendelson-Zeller Company at Los Angeles,

California, for which plaintiff was to receive $2,200, reshipped to El Paso, Texas, and sold at net yield to plaintiff of $548.

XXVII.

The plaintiff South Florida Growers Association, Inc. likewise made shipments of Florida avocados to California which were rejected for alleged oil content under 8% and had to be shipped to other markets. Such avocados were shipped on consignment to plaintiff's sales agent, Calavo, Inc., and after rejection in California reshipped to Phoenix, Arizona, Portland, Oregon, or Seattle, Washington, and sold at prices lower than those obtainable in California, in each instance with added cost of handling and cartage.

XXVIII.

Plaintiffs allege that the sole effect of the 8% oil requirement of section 792 of the Agricultural Code of California, when applied to Florida avocados, is to bar the sale in California by plaintiffs and others of fruit that is mature and wholesome, although of lesser oil content, and to grant a monopoly in the sale of avocados in California to growers [fol. 14] and handlers of avocados that happen to attain 8% or higher oil content, but are not more healthful or edible than avocados which mature with less than 8% oil content; that prohibition of sale in California of Florida avocados solely because of alleged insufficient oil content is an arbitrary and unwarranted obstruction of the free flow of commerce between the states, in violation of article I, section 8, clause 3 of the Constitution of the United States.

XXIX.

Plaintiffs further allege that the denial to plaintiffs of the right to sell in California avocados grown in Florida, when of less than 8% oil content but in no way inimical to the health of the persons who may consume such avocados, while permitting the sale of avocados with 8% or greater oil content but not better fit for consumption, violates the provision of section 1 of the Fourteenth Amendment of the Constitution of the United States that no state shall make

or enforce any law which denies to any person within its jurisdiction the equal protection of the laws.

XXX.

Plaintiffs further allege that section 972 of the Agricultural Code of California is unconstitutional, when applied to avocados delivered for sale in interstate commerce in compliance with the procedures and standards established by the Secretary of Agriculture of the United States pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937, and that the defendants should be enjoined by decree of this court from demanding compliance with different maturity or quality standards as a condition precedent to delivery and sale of such avocados in California.

XXXI.

Because of the arbitrary exclusion of most Florida [fol. 15] avocados from the California market, by imposition of the 8% oil test, plaintiffs are limited to sale of their fruit in other markets in competition with the growers and handlers of avocados who enjoy a virtual monopoly in the California market, at great economic detriment and irreparable loss to plaintiffs.

XXXII.

No practical or adequate remedy is available to plaintiffs in the premises save by the equitable process of injunction.

Wherefore plaintiffs pray:

A. That this case may be heard and determined by a three-judge court, as provided by Title 28 U.S. Code, sections 2281 and 2284.

B. That enforcement of section 792 of the Agricultural Code of California be declared in derogation of article I, section 8, clause 3 of the Constitution of the United States, and of section 1 of the Fourteenth Amendment of the Constitution of the United States, when applied to prohibit delivery and sale in California of avocados grown in Florida

and shipped in interstate commerce, solely upon the ground that such avocados have less than 8% oil content.

C. That the court may further adjudicate that prohibition of delivery and sale in California of avocados grown in Florida and shipped in interstate commerce in compliance with the orders and regulations made by the Secretary of Agriculture of the United States, acting pursuant to the authority vested in him by the Federal Marketing Agreement Act of 1937, is an impermissible nullification of the power exercised by Congress under article I, section 8, clause 3 of the Constitution of the United States to regulate commerce among the states.

D. That the defendants and all officers, agents and employees of the State of California under their control may [fol. 16] be restrained by interlocutory and permanent injunction orders of the court from enforcing or attempting to enforce against the plaintiffs the provisions of section 792, chapter 2, division V of the Agricultural Code of California, by any of the methods provided in said chapter for enforcement of section 792, with respect to delivery and sale in California of avocados grown in Florida, when such enforcement is based upon alleged insufficient oil content of such avocados, or when such enforcement is based upon standards of quality or maturity for such avocados other than the applicable standards established for shipment of such avocados in interstate commerce by the laws of the United States and the regulations made by the Secretary of Agriculture pursuant thereto.

E. That plaintiffs may be granted such other relief in the premises as the court may deem just.

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, attorney for plaintiffs.

Isaac E. Ferguson, attorney for plaintiffs.
(Paul H. Leffmann, of Chicago, Illinois, co-attorney for plaintiffs).

[fol. 17]

EXHIBIT "A" TO COMPLAINT

AVOCADOS
EFFECTIVE JUNE 11, 1954

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

[Reprinted from Federal Register of June 11, 1954]

PART 969—AVOCADOS GROWN IN SOUTH FLORIDA

SUBPART—ORDER REGULATING HANDLING

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AUTHORITY: §§ 969.0 to 969.71 issued under sec. 5, 49 Stat. 753, as amended; 7 U. S. C. 608c.

§ 969.0 *Findings and determinations*—(a) *Findings upon the basis of the hearing record.* Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U. S. C. 601 et seq.), and the applicable rules of practice and procedure, as amended, effec-

tive thereunder (7 CFR Part 900; 19 F. R. 57), a public hearing was held at Homestead (Modella), Florida, from March 8 to March 11, 1954, both dates inclusive, upon a proposed marketing agreement and a proposed marketing order regulating the handling of avocados grown in South Florida. Upon the basis of the evidence introduced at such hearing, and the record thereof, it is found that:

(1) The said order, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the act;

(2) The said order regulates the handling of avocados grown in the designated production area in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, the proposed marketing agreement upon which a hearing has been held;

(3) The said order is limited in its application to the smallest regional production area that is practicable, consistently with carrying out the declared policy of the act, and the issuance of several orders applicable to subdivisions of such production area would not effectively carry out the declared policy of the act;

(4) The said order prescribes, so far as practicable, such different terms, applicable to different parts of the production area, as are necessary to give due recognition to differences in the production and marketing of avocados covered thereby; and

(5) All handling of avocados grown in the production area, as defined herein, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Additional findings.* It is hereby found and determined on the basis hereinafter indicated that good cause exists for making the provisions of this order effective not later than the date of publication in the Federal Register; and that it would be contrary to the public interest to postpone such effective date until 30 days after publication (60 Stat. 237; 5 U. S. C. 1001 et seq.). As soon as

practical after such effective time, it will be necessary to establish the Avocado Administrative Committee, the agency charged with the administration of this program, and for the Avocado Administrative Committee and the Secretary to initiate various actions of both organizational and regulatory natures, including the formulation and promulgation of rules and regulations under the program, which should be completed by the beginning of the harvesting and marketing season. Such season normally starts shortly after the middle of June. The time during which such actions will be concluded should be such that handlers will receive such notice thereof as will enable them reasonably and adequately to prepare for operations under the program. The provisions of the order are well known to the handlers of avocados, since the public hearing in connection with the entire order was concluded March 11, 1953, and the recommended decision and final decision were published in the Federal Register on April 24, 1954 (19 F. R. 2418) and May 21, 1954 (19 F. R. 2784), respectively. Copies of the regulatory provisions of this order were made available to all known interested parties, and compliance with such provisions will not require advance preparation on the part of persons subject thereto which cannot be completed prior to the effective date of regulation pursuant hereto.

(c) *Determinations.* It is hereby determined that:

(1) The marketing agreement regulating the handling of avocados grown in South Florida, upon which the aforesaid public hearing was held, has been executed by handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping avocados covered by this order) who, during the period April 1, 1953, through March 31, 1954, handled not less than 50 percent of the volume of avocados covered by this order;

(2) The issuance of this order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of its approval and who, during the determined representative period (April 1, 1953, through March 31, 1954), were engaged, within the pro-

duction area specified in this order, in the production of avocados for market; such producers having also produced for market at least two-thirds of the volume of avocados represented in such referendum.

It is, therefore, ordered, That, on and after the effective date hereof, the handling of avocados grown in the said production area shall be in conformity to, and in compliance with, the terms and conditions of the aforesaid order; and the terms and conditions of said order are as follows:

DEFINITIONS

§ 969.1 *Secretary.* "Secretary" means the Secretary of Agriculture of the United States or any Officer or employee of the United States Department of Agriculture who is, or may hereafter be, authorized to exercise the powers and perform the duties of the Secretary of Agriculture of the United States.

§ 969.2 *Act.* "Act" means Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U. S. C. 601 et seq.).

§ 969.3 *Person.* "Person" means an individual, partnership, corporation, association or any other business unit.

§ 969.4 *Production area.* "Production area" means the counties of Brevard, Osceola, Polk, Hillsborough, and Pinellas in the State of Florida, and all of the counties of that State situated south of such counties.

[fol. 18] § 969.5 *Avocados.* "Avocados" means all varieties of avocados grown in the production area.

§ 969.6 *Fiscal year.* "Fiscal year" means the twelve-month period ending March 31 of each year.

§ 969.7 *Committee.* "Committee" means the Avocado Administrative Committee established pursuant to § 969.20.

§ 969.8 *Grower.* "Grower" is synonymous with producer and means any person who produces avocados for market and who has a proprietory interest therein.

§ 969.9 *Handler.* "Handler" is synonymous with shipper and means any person (except a common or contract carrier transporting avocados owned by another person) who handles avocados or causes avocados to be handled.

§ 969.10 *Handle.* "Handle" means to sell, consign, deliver, or transport avocados within the production area or between the production area and any point outside thereof in the continental United States or Canada: *Provided*, That such term shall not include: (a) The sale or delivery of avocados to a handler, registered as such with the committee in accordance with such rules and regulations as it may prescribe with the approval of the Secretary, who has facilities within the production area for preparing avocados for market; (b) the delivery of avocados to such a handler solely for the purpose of having such avocados prepared for market; or (c) the transportation of avocados by a handler, so registered with the committee, from the grove to his packing facilities within the production area for the purpose of having such avocados prepared for market. In the event a grower sells his avocados to a handler who is not so registered with the committee, such grower shall be the first handler of such avocados.

§ 969.11 *District.* "District" means the applicable one of the following described subdivisions of the production area:

(a) "District 1" shall include Dade County.

(b) "District 2" shall include all of the production area except Dade County.

ADMINISTRATIVE BODY

§ 969.20 *Establishment and membership.* There is hereby established an Avocado Administrative Committee consisting of nine members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. Five of the members and their respective alternates shall be growers who shall not be handlers or employees of handlers. Four of the members and their respective alternates shall be handlers or employees of handlers. The five members of the committee

who shall be growers and who shall not be handlers, or employees of handlers, are hereinafter referred to as "grower" members of the committee; and the four members who shall be handlers, or employees of handlers, are hereinafter referred to as "handler" members of the committee. Four of the five grower members shall be producers of avocados in District 1, and one grower member shall be a producer of avocados in District 2. Three of the four handler members shall be handlers, or employees of handlers, of avocados in District 1, and one handler member shall be a handler, or an employee of a handler, of avocados in District 2.

§ 969.21 *Term of office.* The term of office of each member and alternate member of the committee shall begin April 1, and shall terminate March 31 of the following year. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and qualify and until their respective successors are selected and have qualified. The consecutive terms of office of members shall be limited to three terms.

§ 969.22 *Nomination.*—(a) *Initial members.* Nominations for each of the five initial grower members and four initial handler members of the committee, together with nominations for the initial alternate members for each position, may be submitted to the Secretary by individual growers and handlers. Such nominations may be made by means of group meetings of the growers and handlers concerned in each district. Such nominations, if made, shall be filed with the Secretary no later than ten calendar days prior to the effective date hereof. In the event nominations for initial members and alternate members of the committee are not filed pursuant to, and within the time specified in, this section, the Secretary may select such initial members and alternate members without regard to nominations, but selections shall be on the basis of the representation provided for in § 969.20.

(b) *Successor members.* (1) Nominations for successor members of the committee, and their respective alternates, shall be made at meetings of growers and handlers in each

district. Such meetings shall be held at such times (on or before February 15 of each year) and places as the committee shall designate. Such nominations shall be submitted promptly to the Secretary by the committee. The committee shall prescribe procedural rules, not inconsistent with the provisions of this section, for the conduct of such meetings.

(2) Only growers who are present at such nomination meetings, or represented at such nomination meetings by duly authorized agents, shall participate in the nomination and election of nominees for grower members and their alternates. Each grower shall be entitled to cast only one vote for each nominee to be elected in the district in which he produces avocados. No grower shall participate in the election of nominees in more than one district in any one fiscal year.

(3) Only handlers who are present at such nomination meetings, or represented at such meetings by duly authorized agents, shall participate in the nomination and election of nominees for handler members and their alternates. Each handler shall be entitled to cast only one vote for each nominee to be elected in the district in which he handles avocados, which vote shall be weighted by the volume of avocados shipped by such handler during the then current fiscal year. No handler shall participate in the election of nominees in more than one district in any one fiscal year.

§ 969.23 *Selection.* From the nominations made pursuant to § 969.22, or from other qualified persons, the Secretary shall select the five grower members of the committee, the four handler members of the committee, and an alternate for each such member.

§ 969.24 *Failure to nominate.* If nominations are not made within the time and in the manner prescribed in § 969.22, the Secretary may, without regard to nominations, select the members and alternate members of the committee on the basis of the representation provided for in § 969.20.

§ 969.25 *Acceptance.* Any person selected by the Secretary as a member or as an alternate member of the com-

mittee shall qualify by filing a written acceptance with the Secretary within ten days after being notified of such selection.

§ 969.26 *Vacancies.* To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the committee to qualify, or in the event of the death, removal, resignation, or disqualification of any member or alternate member of the committee, a successor for the unexpired term of such member or alternate member of the committee shall be nominated and selected in the manner specified in §§ 969.22 and 969.23. If the names of nominees to fill any such vacancy are not made available to the Secretary within fifteen days after such vacancy occurs, the Secretary may fill such vacancy without regard to nominations, which selection shall be made on the basis of representation provided for in § 969.20.

§ 969.27 *Alternate members.* An alternate member of the committee, during the absence or at the request of the member for whom he is an alternate, shall act in the place and stead of such member. In the event of the death, removal, resignation, or disqualification of a member, his alternate shall act for him until a successor for such member is selected and has qualified.

§ 969.28 *Powers.* The committee shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part;

(c) To make and adopt rules and regulations to effectuate the terms and provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 969.29 *Duties.* The committee shall have, among others, the following duties:

(a) To select a chairman and such other officers as may be necessary, and to define the duties of such officers;

(b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and to define the duties of each;

[fol. 19] (c) To submit to the Secretary as soon as practicable after the beginning of each fiscal year a budget for such fiscal year, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such fiscal year;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

(f) To cause its books to be audited by a certified public accountant at least once each fiscal year, and at such other times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To investigate growing and maturity conditions of avocados, and to assemble data in connection therewith;

(i) To engage in such research relating to the determination of maturity and grade standards for avocados as may be approved by the Secretary;

(j) To submit to the Secretary such available information as he may request;

(k) To notify, as provided in this part, producers and handlers of all meetings of the committee to consider recommendations for regulation;

(l) To give the Secretary the same notice of meetings of the committee as is given to its members;

(m) To consult with such representatives of growers or groups of growers as may be deemed necessary and to pay the travel expenses incurred by such representatives in attending committee meetings at the request of the com-

mittee: *Provided,* That the committee shall not pay the travel expenses of more than three such representatives in connection with any one meeting of the committee; and

(n) To investigate compliance with the provisions of this part.

§ 969.30 *Procedure.* (a) Six members of the committee, or alternates acting for members, shall constitute a quorum and any action of the committee shall require at least five concurring votes: *Provided,* That at least one handler member shall approve the action.

(b) The committee may vote by telegraph, telephone, or other means of communication, and any votes so cast shall be confirmed promptly in writing: *Provided,* That if an assembled meeting is held, all votes shall be cast in person.

§ 969.31 *Expenses and compensation.* The members of the committee, and their respective alternates when acting as members, shall be reimbursed for expenses necessarily incurred by them in the performance of their duties under this part and shall also receive compensation, as determined by the committee, which shall not exceed $10 per day or portion thereof spent in performing such duties.

§ 969.32 *Annual report.* The committee shall, prior to March 31 of each fiscal year, prepare and mail an annual report to the Secretary, and to each handler and grower who requests a copy of the report. This annual report shall contain at least: (a) A complete review, by districts, of the regulatory operations during the fiscal year; (b) an appraisal of the effect of such regulatory operations upon the avocado industry; and (c) any recommendations for changes in the program.

EXPENSES AND ASSESSMENTS

§ 969.40 *Expenses.* The committee is authorized to incur such expenses as the Secretary finds are reasonable and may be necessary to enable the committee to exercise its powers and perform its duties in accordance with the provisions of this part during each fiscal year. The funds to

cover such expenses shall be acquired by the levying of assessments as provided for in § 969.41.

§ 969.41 *Assessments.* (a) Each person who first handles avocados shall, with respect to the avocados so handled by him, pay to the committee upon demand such person's pro rata share of the expenses which the Secretary finds will be incurred by the committee during each fiscal year. Each such person's share of such expenses shall be equal to the ratio between the total quantity of avocados handled by him as the first handler thereof during the applicable fiscal year, and the total quantity of avocados so handled by all persons during the same fiscal year. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the rate of assessment to be paid by each such person. At any time during or after the fiscal year, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any finding by the Secretary relative to the expense which may be incurred: *Provided,* That, in no case, shall the rate of assessment exceed 10 cents per 55-pound box, or an equivalent quantity, of avocados. Such increase shall be applied to all avocados handled during the applicable fiscal year. In order to provide funds for the administration of the provisions of this part, the committee may accept the payment of assessments in advance, and may borrow money in any amount not to exceed 10 percent of the estimated expenses set forth in its budget for the then current fiscal year.

§ 969.42 *Accounting.* (a) If, at the end of a fiscal year, the assessments collected are in excess of the expenses incurred, each person entitled to a proportionate refund of the excess assessment shall be credited with such refund against the operations of the following fiscal year. Any handler may demand payment of such a refund, and the refund shall be paid to him: *Provided,* That any sum paid by a person in excess of his pro rata share of the expenses

during any fiscal year may be applied by the committee at the end of such fiscal year to any outstanding obligations due the committee from such person.

(b) All funds received by the committee pursuant to the provisions of this part shall be used solely for the purposes specified in this part, and shall be accounted for in the manner provided in this part. The Secretary may, at any time, require the committee and its members to account for all receipts and disbursements.

REGULATIONS

§ 969.50 *Recommendations for regulation.* (a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of avocados grown in District 1 or District 2 in the manner provided in § 969.51, it shall so recommend to the Secretary.

(b) In arriving at its recommendations pursuant to paragraph (a) of this section, the committee shall give consideration to such of the following factors as may be applicable: (1) The estimated total production and shipments of each variety of avocados, including avocados grown in other areas; (2) the time of bloom and growing conditions during the development of the crop; (3) the quality of the avocado crop; (4) the anticipated demand for avocados; and (5) other available information having a bearing on the market for avocados. With each recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated, and such other available information as the Secretary may request.

(c) All meetings of the committee held for the purpose of formulating recommendations for regulations shall be open to growers and handlers. The committee shall give notice of such meetings to growers and handlers by mailing such notice to each grower and handler who has filed his address with the committee and requested such notice.

§ 969.51 *Issuance of regulations.* (a) The Secretary shall regulate, in the manner specified in this section, the handling of avocados whenever he finds, from the recommenda-

tions and information submitted by the committee or from other available information, that such regulations will tend to effectuate the declared policy of the act. Such regulations may:

(1) Prohibit, prior to such time as shall be specified, the handling of any size or sizes of any variety or varieties of avocados grown in District 1 or District 2; and

(2) Prohibit the handling of any variety or varieties of avocados grown in District 1 or District 2 which do not meet such quality and maturity standards as shall be prescribed.

(b) The committee shall be informed immediately of any such regulations issued by the Secretary and the committee shall promptly give notice thereof to growers and handlers.

§ 969.52 *Modification, suspension, or termination of regulations.* (a) In the event the committee at any time finds that, by reason of changed conditions, any regulations issued pursuant to § 969.51 should be modified, suspended or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds, from the recommenda- [fol. 20] tions and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of avocados in order to effectuate the declared policy of the act, he shall modify, suspend, or terminate such regulation. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the act, he shall suspend or terminate such regulation. On the same basis and in like manner the Secretary may terminate any such modification or suspension.

§ 969.53 *Exemption certificate.* Whenever a regulation is in effect pursuant to paragraph (a) (1) of § 969.51, the committee shall issue one or more exemption certificates to any person who furnishes proof, satisfactory to the committee, that his avocados of a particular variety are mature prior to the time such variety may be handled under such regulation. Such exemption certificates shall authorize the person to whom the certificates are issued to handle, or

have handled, only that portion of his avocados of the particular variety which the committee has determined to be mature. The committee shall adopt, with the approval of the Secretary, procedural rules by which such exemption certificates will be issued and the avocados covered thereunder may be handled. Exemption certificates shall be transferred to the handler of the avocados covered by such certificates at the time the avocados are delivered to such handler.

§ 969.54 *Inspection and certification.* Whenever the handling of any variety of avocados is regulated pursuant to § 969.51, each handler who handles avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation: *Provided,* That such inspection and certification shall not be required whenever the avocados previously have been so inspected and certified. Promptly thereafter, each such handler shall submit, or cause to be submitted, to the committee a copy of the certificate of inspection with respect to such handling.

§969.55 *Avocados not subject to regulations.* Except as otherwise provided in this section, any person may, without regard to the provisions of §§ 969.41, 969.51, and 969.54, and the regulations issued thereunder, handle avocados (a) for consumption by charitable institutions; (b) for distribution by relief agencies; (c) for export other than to Canada; (d) for commercial processing into products; or (e) in such minimum quantities or types of shipments as the committee, with the approval of the Secretary, may prescribe. The committee shall, with the approval of the Secretary, prescribe such rules, regulations, and safeguards as it may deem necessary to prevent avocados handled under the provisions of this section from entering channels of trade for other than the specific purposes authorized by this section. Such rules, regulations, and safeguards may include the requirements that handlers shall file applications with the committee for authorization to handle avocados pursuant to this section, and that such applications be accompanied by a certification by the intended purchaser

or receiver that the avocados will not be used for any purpose not authorized by this section.

§ 969.60 *Reports.* (a) Each handler shall furnish to the committee, at such times and for such periods as the committee may designate, certified reports covering, to the extent necessary for the committee to perform its functions, the following: (1) The quantities of each variety of avocados he received; (2) a complete record of the quantities disposed of by him, segregated as to varieties and as to the respective quantities subject to regulation and not subject to regulation; (3) the date of each such disposition and the identification of the carrier transporting such fruit; (4) identification of the inspection certificates and the exemption certificates, if any, pursuant to which the fruit was handled, together with the destination of each such exempted disposition, and of all fruit handled pursuant to § 969.55; and (5) the quantity of each variety held by him at the end of the period.

(b) Upon request of the committee, made with the approval of the Secretary, each handler shall furnish to the committee, in such manner and at such times as it may prescribe, such other information as may be necessary to enable the committee to perform its duties under this part.

MISCELLANEOUS PROVISIONS

§ 969.61 *Compliance.* Except as provided in this part, no person shall handle avocados, the shipment of which have been prohibited by the Secretary in accordance with the provisions of this part; and no person shall handle avocados except in conformity with the provisions of this part and the regulations issued under this part.

§ 969.62 *Right of the Secretary.* The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any

time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

§ 969.63 *Effective time.* The provisions of this part shall become effective at such time as the Secretary may declare above his signature to this part, and shall continue in force until terminated in one of the ways specified in § 969.64.

§ 969.64 *Termination.* (a) The Secretary may at any time terminate the provisions of this part by giving at least one day's notice by means of a press release or in any other manner in which he may determine.

(b) The Secretary shall terminate or suspend the operation of any and all of the provisions of this part whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this part at the end of any fiscal year whenever he finds that continuance is not favored by the majority of producers who, during a representative period determined by the Secretary, were engaged in the production of avocados for market: *Provided,* That such termination is announced on or before March 15 of the then current fiscal year. The Secretary shall, as soon as practicable after the close of the fiscal year ending March 31, 1956, conduct a referendum of producers and a poll of handlers to determine whether the continuation of this part is favored by them. Producers entitled to vote in such referendum shall be those who, during the fiscal year ending March 31, 1956, were engaged in producing avocados for market and the poll shall be confined to handlers who handled avocados in that same fiscal year. If it develops from said referendum and poll that (1) less than two-thirds of the producers, by number or volume of production represented in said referendum, favor the continuance of this part, or (2) handlers representing more than one-half the volume of avocados handled favor termination of this part, the Secretary shall thereupon terminate this part.

(d) The provisions of this part shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

§ 969.65 *Proceedings after termination.* (a) Upon the termination of the provisions of this part, the committee shall, for the purpose of liquidating the affairs of the committee, continue as trustees of all the funds and property then in its possession, or under its control, including claims for any funds unpaid or property not delivered at the time of such termination.

(b) The said trustees shall (1) continue in such capacity until discharged by the Secretary; (2) from time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and of the trustees, to such persons as the Secretary may direct; and (3) upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person, full title and right to all of the funds, property, and claims vested in the committee or the trustees pursuant thereto.

(c) Any person to whom funds, property, or claims have been transferred or delivered, pursuant to this section, shall be subject to the same obligation imposed upon the committee and upon the trustees.

§ 969.66 *Effect of termination or amendment.* Unless otherwise expressly provided by the Secretary, the termination of this part or of any regulation issued pursuant to this part, or the issuance of any amendment to either thereof, shall not (a) effect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this [fol. 21] part or any regulation issued under this part, or (b) release or extinguish any violation of this part or of any regulation issued under this part, or (c) affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violation.

§ 969.67 *Duration of immunities.* The benefits, privileges, and immunities conferred upon any person by virtue

of this part shall cease upon its termination, except with respect to acts done under and during the existence of this part.

§ 969.68 *Agents.* The Secretary may, by designation in writing, name any officer or employee of the United States, or name any agency or division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this part.

§ 969.69 *Derogation.* Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States (a) to exercise any powers granted by the act or otherwise, or (b) in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 969.70 *Personal liability.* No member or alternate member of the committee and no employee or agent of the committee shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member, alternate, employee, or agent, except for acts of dishonesty, willful misconduct, or gross negligence.

§ 969.71 *Separability.* If any provision of this part is declared invalid or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this part or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

Dated: June 8, 1954.

JOHN H. DAVIS,

[SEAL] *Assistant Secretary of Agriculture.*

[fol. 22]

Exhibit "B" to Complaint

(See opposite) ☞

AVOCADO SHIPPING DATES
1957-58 Season
(Issued October 8, 1957)

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7
(Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	10-14	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	10-28	10	2 15/16	11-18
Nirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 3/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
B. Prince	10-7	16		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	--
(Lula	--	--	--	--	--	--	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								12-25
Hickson	10-21	14	3 4/16	11-4	12	3 1/16	11-18	10	2 15/16	12-9
Collinson	10-21	16	3 11/16	11-4	14	3 8/16	11-18	10	3 1/16	12-9
Avon	10-21	14	3 8/16	11-4	12	3 5/16	11-18	9	2 15/16	12-9
Booth 5	10-21	16	3 11/16	11-4	14	3 9/16	11-18	10	3 3/16	12-9
Blair	10-21	16		11-4			11-18			12-9
Nelson	10-21	14	3 8/16	11-4	12	3 5/16	11-18	10	3 1/16	12-9
Winslowson	10-28	18	3 14/16	11-11	16	3 12/16	11-25	10	3 2/16	12-24
Monroe	10-28	24		11-25	20		12-16	14		1-6
Hall	10-21	24	3 13/16	11-4	18	3 7/16	12-2	14	3 3/16	12-24
Herman	11-4	16	3 9/16	11-18	14	3 7/16	12-2	10	3 1/16	12-24
Booth 10	11-4	16		11-18	14		12-2	10		12-24
Booth 11	10-28	16	3 12/16	11-11	14	3 9/16	12-2	10	3 3/16	12-24
Ajax(B. 7B)	11-11	18	3 12/16	11-25	15	3 9/16	12-9	11	3 3/16	12-31
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31
Booth 1	11-18	16	3 11/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Taylor	11-18	14	3 4/16	12-2	12	3 2/16	12-16	9	2 13/16	1-6

Blair	10-21	16			11-4				11-18			12-9
Nelson	10-21	14	3	8/16	11-4	12	3	5/16	11-18	10	3	1/16	12-9
Winslowson	10-28	18	3	14/16	11-11	16	3	12/16	11-25	10	3	2/16	12-24
Monroe	10-28	24			11-25	20			12-16	14			1-6
Hall	10-21	24	3	13/16	11-4	18	3	7/16	12-2	14	3	3/16	12-24
Herman	11-4	16	3	9/16	11-18	14	3	7/16	12-2	10	3	1/16	12-24
Booth 10	11-4	16			11-18	14			12-2	10			12-24
Booth 11	10-28	16	3	12/16	11-11	14	3	9/16	12-2	10	3	3/16	12-24
Ajax(B. 7B)	11-11	18	3	12/16	11-25	15	3	9/16	12-9	11	3	3/16	12-31
Booth 3	11-11	16	3	9/16	11-25	14	3	7/16	12-9	10	3	1/16	12-31
Booth 1	11-18	16	3	11/16	12-2	14	3	8/16	12-16	10	3	1/16	1-6
Taylor	11-18	14	3	4/16	12-2	12	3	2/16	12-16	9	2	13/16	1-6
Dunedin	11-18	16	3	10/16	12-2	14	3	8/16	12-16	10	3	1/16	1-6
Choquette	10-28	30	4	5/16	11-18	22	3	15/16	12-2	18	3	11/16	1-6
Linda	12-9	18			12-23	15			1-6	12			1-20
Byars #1	12-9	16			12-23	14			1-6	10			1-27
Nabal	12-9	14	3	8/16	12-23	12	3	5/16	1-6	9	3	0/16	1-27
Wagner	12-16	12	3	5/16	12-30	10	3	2/16	1-13	8	2	14/16	2-3
Schmidt	1-27	16			2-10	14							2-24
Itzamna	2-24												2-24

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight on or after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations

West Indian Type:
None to be shipped before June 3
June 3 to June 17, none smaller than 16 oz.
June 17 to July 15, none smaller than 14 oz.
July 15 to Sept. 9, none smaller than 12 oz.
On or after Sept. 9, no size restrictions

Guatemalan Type and Guatemalan x W. Indian Hybrids:
None to be shipped before Sept. 9
Sept. 9 to Oct. 7, none smaller than 14 oz.
Oct. 7 to Dec. 23, none smaller than 12 oz.
On or after Dec. 23, no size restrictions

Exceptions applicable to seedlings and unlisted varieties: Avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

[fol. 23]

EXHIBIT "C" TO COMPLAINT

FLORIDA AVOCADO ORDER 69 AS AMENDED

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

AVOCADO ADMINISTRATIVE COMMITTEE RULES AND REGULATIONS

GRADE STANDARDS, AS AMENDED

[Reprinted from the Federal Register of April 13, 1956]

§ 969.130 *Quality regulations.* Quality regulations recommended and established pursuant to § 969.50 shall be on the basis of the following specifications or appropriate modifications thereof:

(a) *No. 1 grade.* "No. 1 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, well formed, clean, well colored, well trimmed, and which are free from decay, anthracnose, freezing injury and free from damage caused by bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade: *Provided*, That not more than one-half of this amount, or 5 percent, may be affected by anthracnose or decay, including therein not more than 1 percent for decay. (See Application of Tolerances and Standard Pack Requirements.)

(b) *Combination grade.* Any lot of avocados may be designated "Combination grade" when not less than 60 percent, by count, of the avocados in each container meet the requirements of the No. 1 grade and the remainder meet the requirements of the No. 2 grade. In order to allow for variations incident to proper grading and handling, not

more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of the No. 2 grade: *Provided*, That not more than one-half of this amount, or 5 percent, may be affected by anthracnose or decay, including therein not more than 1 percent for decay. No part of any tolerance shall be allowed to reduce for the lot as a whole the percentage of No. 1 fruit required or specified in the combination, but individual containers may have not more than 10 percent less than the percentage of No. 1 fruit required or specified. (See Application of Tolerances and Standard Pack Requirements.)

(c) *No. 2 grade.* "No. 2 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, fairly well formed, clean, fairly well colored, well trimmed and which are free from decay, freezing injury and free from serious damage caused by anthracnose, bruises, cuts or other skin breaks, pulled stems, russetting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade: *Provided*, That not more than one-half of this amount, or 5 percent, shall be allowed for serious damage by anthracnose or decay, including therein not more than 1 percent for decay. (See Application of Tolerances and Standard Pack Requirements.)

(d) *No. 3 grade.* "No. 3 grade" consists of avocados of similar varietal characteristics which are mature but not overripe, which are not badly misshapen, and which are free from decay and free from serious damage caused by anthracnose and from very serious damage caused by freezing injury, bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, dirt, or mechanical or other means. In order to allow for variations incident to proper grading and handling, not more than a total of 10 percent, by count, of the avocados in any lot may fail to meet the requirements of this grade.

including therein not more than 2 percent of decay. (See Application of Tolerances and Standard Pack Requirements.)

(e) *Unclassified.*—"Unclassified" consists of avocados which have not been classified in accordance with any of the foregoing grades. The term "unclassified" is not a grade, as used herein, but is provided as a designation to show that no grade has been applied to the lot.

(f) *Standard pack.* (1) The avocados shall be packed in accordance with good commercial practice and the pack shall be at least fairly tight. The size of the avocados may be specified by count. The weight of the smallest fruit in a container shall be not less than 75 percent of the weight of the largest fruit.

(2) In order to allow for variations incident to proper packing and sizing, not more than 5 percent of the containers may fail to meet the requirements for fairly tight. And not more than 5 percent, by count, of the avocados in any container may weigh less than 75 percent of the weight of the largest fruit: *Provided*, That no fruit, in any container, shall be less than 60 percent of the weight of the largest fruit.

(g) *Application of tolerances.* The contents of individual packages in the lot, based on sample inspection, are subject to the following limitations: *Provided*, That the averages for the entire lot are within the tolerances specified for the grade:

(1) For packages which contain more than 20 avocados and a tolerance of 10 percent or more is provided, individual packages in any lot shall have not more than one and one-half times the tolerance specified. For packages which contain more than 20 avocados and a tolerance of less than 10 percent is provided, individual packages in any lot shall have not more than double the tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package.

(2) For packages which contain 20 avocados or less, individual packages shall have not more than double the

tolerance specified, except that at least one defective and one off-size specimen may be permitted in any package.

(h) *Definitions*—(1) *Similar varietal characteristics.* "Similar varietal characteristics" means that the avocados in any container are similar in shape, texture and color of skin and flesh.

(2) *Mature.* "Mature" means that the avocado has reached a stage of growth which will insure a proper completion of the ripening process.

(3) *Overripe.* "Overripe" means that the avocado is dead ripe with flesh soft or discolored and past commercial use.

(4) *Well formed.* "Well formed" means that the avocado has the normal shape characteristic of the variety.

(5) *Clean.* "Clean" means that the avocado is practically free from dirt, staining or other foreign material.

(6) *Well colored.* "Well colored" means that the avocado has the color characteristic of the variety.

(7) *Well trimmed.* "Well trimmed" means that the stem, when present, is cut off fairly smoothly at a point not more than one-fourth inch beyond the shoulder of the avocado.

(8) *Damage.* "Damage" means any defect which materially affects the appearance, or the edible or shipping quality of the individual fruit, or the general appearance of the fruits in the container. Any one of the following defects, or any combination of defects, the seriousness of which exceeds the maximum allowed for any one defect, shall be considered as damage:

(i) Cuts or other skin breaks when not healed and penetrating beneath the epidermis or the aggregate area exceeds the area of a rectangle one inch in length and one-eighth inch in width; or when healed and the appearance is materially affected.

(ii) Pulled stems when the exposed stem cavity is excessively deep, or when skin surrounding the stem cavity is more than slightly torn.

(iii) Russeting or similar discolorations when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface dis- [fol. 24] coloration aggregating 10 percent of the fruit surface.

(iv) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 10 percent of the fruit surface.

(v) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunburn aggregated 10 percent of the fruit surface.

(vi) Sunscald or sprayburn when not well-healed, or when soft, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 10 percent of the fruit surface.

(9) *Fairly well formed.* "Fairly well formed" means that the avocado may be slightly abnormal in shape but not to the extent that the appearance is seriously affected.

(10) *Fairly well colored.* "Fairly well colored" means that the avocado shows a shade of color which is fairly characteristic of the variety.

(11) *Serious damage.* "Serious damage" means any defect which seriously affects the appearance, or the edible or shipping quality of the individual fruit, or the general appearance of the avocados in the container. Any one of the following defects, or any combination of defects, the seriousness of which exceeds the maximum allowed for any one defect, shall be considered as serious damage:

(i) Anthracnose when any spot exceeds the area of a circle one-fourth inch in diameter, or when more than 3 spots each exceeding the area of a circle three-sixteenths inch in diameter.

(ii) Cuts or other skin breaks when not healed and the aggregate area exceeds the area of a rectangle one inch

in length and one-fourth inch in width, or when not healed and penetrating into the flesh of the fruit, or when healed and the appearance is seriously affected.

(iii) Pulled stems when the skin surrounding the exposed stem cavity is torn more than an aggregate area of a circle one-fourth inch in diameter, or when flesh is torn.

(iv) Russeting or similar discoloration when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface discoloration aggregating 25 percent of the fruit surface.

(v) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 25 percent of the fruit surface.

(vi) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunburn aggregating 25 percent of the fruit surface.

(vii) Sunscald or sprayburn when not well-healed, or when soft, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 25 percent of the fruit surface.

(viii) Cercospora spot when any spot exceeds the area of a circle 1/4 inch in diameter or when more than three spots each of which exceeds the area of a circle 3/16 inch in diameter, or when the aggregate area of all spots exceeds the area of a circle 1 inch in diameter.

(12) *Badly misshapen.* "Badly misshapen" means that the avocado is so badly curved, constricted, pointed or otherwise deformed that the appearance is very seriously affected.

(13) *Very serious damage.* "Very serious damage" means any defect which very seriously affects the appearance, or the edible or shipping quality of the avocado. Any one of the following defects, or any combination of defects, the seriousness of which exceeds the maximum al-

lowed for any one defect, shall be considered as very serious damage:

(i) Cuts or other skin breaks when not healed and penetrating into the flesh of the fruit, or any skin break very seriously affecting the appearance, or the edible or shipping quality.

(ii) Pulled stems when the skin surrounding the exposed stem cavity is torn more than an aggregate area of a circle one-half inch in diameter, or when the flesh is torn.

(iii) Russeting or similar discoloration when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown surface discoloration aggregating 50 per cent of the fruit surface.

(iv) Scars or scab when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 50 per cent of the fruit surface.

(v) Sunburn when the appearance of the avocado is affected to a greater extent than that of an avocado which has greenish-yellow colored sunburn aggregating 50 per cent of the friut surface.

(vi) Sunscald or sprayburn when not well healed, or when the appearance of the avocado is affected to a greater extent than that of an avocado which has light-brown superficial, fairly smooth scars aggregating 50 per cent of the fruit surface.

[fol. 27] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ANSWER—Filed December 6, 1957

Come now W. C. Jacobsen, Director of Agriculture, State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General, State of California, and for their causes of defense allege as follows:

First Defense

That the complaint fails to state a claim against these answering defendants upon which relief can be granted.

[fol. 28]

Second Defense

That the above-entitled court lacks jurisdiction over the subject matter set forth in plaintiffs' complaint, or at all.

Third Defense

That these answering defendants admit the allegations contained in paragraphs II, V, VI, VIII, IX, X, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' complaint; that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VII, XII, XIII, XIV, XXII, XXIV (being paragraph numbered XXIV and appearing on lines 16 to 24, page 11, plaintiffs' complaint), and XXVII of plaintiffs' complaint and on said ground deny the truth of each and every allegation contained in said paragraphs; that these answering defendants deny each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV (being paragraph numbered XXIV and appearing on lines 26 to 32, page 11,

and lines 1 to 10, page 12, plaintiffs' complaint), XXVIII, XXIX, XXX, XXXI, and XXXII of plaintiffs' complaint; that these answering defendants admit the allegations contained in lines 29 to 32, page 7, and lines 1 to 10, page 8, ending with "February," of paragraph XV of plaintiffs' complaint, and deny each and every allegation contained in lines 10 to 19, page 8, beginning with "Thus" on line 10, page 8, and ending with "California" on line 19, page 8, of paragraph XV of plaintiffs' complaint; that these answering defendants deny each and every allegation contained in paragraph XXVI of plaintiffs' complaint excepting that defendants admit that they have in the past and now stand ready to perform their duties under their oath of office should they acquire knowledge of violations of the Agricultural Code of the State of California.

[fol. 29]

Fourth Defense

That the federal courts have adopted the salutary policy of judicial self-restraint in suspending or enjoining enforcement of state statutes alleged to be unconstitutional on the ground that a complainant might be civilly or criminally prosecuted for violation of them, where the state court, which has the last word on the construction and meaning of the statute, has never passed upon the statute attached. In the absence of a showing that the danger of irreparable loss is both great and immediate, plaintiffs herein should first set up the invalidity of the statute in the state court, even though the validity of the statute is challenged, since there is ample opportunity for ultimate review by the United States Supreme Court of federal questions after decision by the state court.

Fifth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing

of immature, unwholesome avocados, thus maintaining the industry reputation and consumer and trade market demand for mature, wholesome, nutritious avocados.

Wherefore, defendants pray:

1. That the plaintiffs' complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, de- [fol. 30] livered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendants be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendants their costs.

Dated: December 6, 1957.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

Affidavit of Service by Mail (omitted in printing).

[fol. 36] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

[Title omitted]

INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO THE DEFENDANT W. C. JACOBSEN—Filed February 24, 1958

Pursuant to rule 33 of the Rules of Civil Procedure for the United States District Courts, the defendant W. C. Jacobsen, Director of the Department of Agriculture of the State of California, is hereby requested by the plaintiffs herein to answer under oath within the time provided by said rule 33 each of the following interrogatories:

Interrogatory No. 1

Does the California Department of Agriculture maintain a Bureau of Agricultural Statistics, a Bureau of Market News, and a Crop and Livestock Reporting Service, and if so what are the functions of these bureaus and services?

[fol. 37]

Interrogatory No. 2

Does the Department of Agriculture of California, either alone or jointly with the United States Department of Agriculture, keep records of the quantities of various crops produced in California, in particular fruit crops, the quantities of each such crop received and unloaded at wholesale markets within the state, and the quantities of each such crop shipped out of the state?

Interrogatory No. 3

With particular reference to avocados grown in California, do the records of the California Department of Agriculture account for all such avocados received and unloaded at wholesale markets within the state, or only a portion thereof?

Interrogatory No. 4

In the three years from October 1, 1954 to September 30, 1957, what were the monthly receipts and unloads of avocados at the Los Angeles, Oakland and San Francisco wholesale markets, so far as shown by the records of the California Department of Agriculture (or records kept by the joint Federal-State Market News Service)?

Interrogatory No. 5

In each month of the three-year period from October 1, 1954 to September 30, 1957, what quantities of avocados grown in California were shipped out of the state, so far as shown by the aforesaid records?

Interrogatory No. 6

If the answers to Interrogatories Nos. 4 and 5 are given in carlot equivalents, by what mathematical formula are carlots convertible into tons?

Interrogatory No. 7

What was the total production of avocados in California in the crops years 1954-1955, 1955-1956 and 1956-1957, as shown by the crop production records of the California [fol. 38] Department of Agriculture (or records kept jointly by the United States Department of Agriculture and the California Department of Agriculture)?

Interrogatory No. 8

What was the total production of avocados in California, and the percentage of such production to the total production of avocados in the United States, as shown by the aforesaid records, in the 10-year period from 1945 to 1954, also in each of the crop years 1954-1955, 1955-1956 and 1956-1957?

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, attorney for plaintiffs.

Acknowledgment of Service (omitted in printing).

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ANSWERS OF DEFENDANT W. C. JACOBSEN TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS—Filed March 6, 1958

Answer to Interrogatory No. 1:

The California Department of Agriculture maintains a Bureau of Agricultural Statistics. This Bureau is a part of the California Crop and Livestock Reporting Service, which is supported jointly under a cooperative agreement between the California Department of Agriculture and the

United States Department of Agriculture. The function of the California Crop and Livestock Reporting Service is to collect, analyze and publish statistical data for the State of California relating to the production, price, value, stocks, [fol. 40] and utilization of crops, livestock and other agricultural products of California. Estimates of State totals and averages for the above items have been designated as part of the Federal program of Agricultural Statistics of the United States Department of Agriculture. As such, these estimates are compiled in accordance with the established policies and procedures of the Crop Reporting Board of the United States Department of Agriculture, and are approved by the said Crop Reporting Board before release.

The California Department of Agriculture also maintains a Bureau of Market News. This work is carried on under a cooperative agreement between the California Department of Agriculture and the United States Department of Agriculture under the official operating title of "Federal-State Market News Service." The function of the Federal Market News Service is to collect and disseminate current information relative to market prices, supply, demand, shipping movement and storage of agricultural commodities.

Answer to Interrogatory No. 2:

The California Crop and Livestock Reporting Service prepares estimates of quantities of the principal crops, including avocados and other fruit crops, produced in California. Such estimates of the total production for the State of California are approved by the Crop Reporting Board of the United States Department of Agriculture before release and publication, and are authorized as the official estimates for the State by the California Department of Agriculture and by the United States Department of Agriculture.

The Federal-State Market News Service compiles receipts and unload records which show the quantities of cer- [fol. 41] tain fruits and vegetables unloaded in the wholesale terminal market centers at Los Angeles, San Francisco, Oakland, and at other wholesale locations in these metro-

politan areas as are practicable to be tabulated. The Federal-State Market News Service does not keep records of quantities of fruits and vegetables unloaded at other wholesale markets within the State. The Federal-State Market News Service keeps records on the quantity of about 45 different fruits and vegetables shipped by rail, but these records do not include avocados. The Federal-State Market News Service keeps records on the quantity of about 33 different fruits and vegetables shipped out of state by truck. Records are kept on the quantity of avocados shipped out of state by truck.

Answer to Interrogatory No. 3:

With reference to avocados grown in California, the records of the Federal-State Market News Service do not account for all avocados grown in California and received and unloaded at wholesale markets within the State, but only account for a portion thereof. As a part of a national program, the avocados unload records which are compiled at the Los Angeles, San Francisco and Oakland wholesale market centers are designed to measure the quantities of avocados entering the wholesale market channels at the specific market centers for which such data are tabulated. On that basis, the unload data are believed to be substantially complete, but the Federal-State Market News Service makes no claim that the unload data for these specific markets measure the total quantities entering consumption channels. The purpose of the unload data at these three wholesale market centers is to provide buyers and sellers with a timely measure of supply available for trading each day. [fol. 42] The Federal-State Market News Service does not compile records of receipts or unloads of California-grown avocados at any other points in the State of California.

Answer to Interrogatory No. 4:

The attached tables Numbered 1, 2, and 3 show unloads of avocados at Los Angeles, San Francisco, and Oakland for the period October 1, 1954, through September 30, 1957, by months. These tables were prepared from the 1954, 1955, 1956, and 1957 annual reports entitled "Unloads of

Fresh Fruits and Vegetables" issued by the Los Angeles and San Francisco offices of the Federal-State Market News Service.

Answer to Interrogatory No. 5:

Since records of rail shipments of avocados are not maintained by the Federal-State Market News Service, the California Department of Agriculture cannot submit complete information showing quantities of California-grown avocados shipped out of the State of California. The information available is limited to the quantities of avocados shipped out of the State of California by truck. Table 4 attached shows the truck shipments of avocados out of the State of California.

Answer to Interrogatory No. 6:

As indicated above, the answers to Interrogatories Nos. 4 and 5 are given in carlot equivalents. The California Department of Agriculture does not have an official mathematical formula by which carlots are converted to tons. The basic unit used by the Federal-State Market News Service to measure volume of fresh fruits and vegetables moving to market is in terms of rail cars. Quantities of fresh fruits and vegetables arriving at terminal markets [fol. 43] by motor truck are first tabulated in terms of numbers of packages. The numbers of the various types of packages are converted to rail carlot equivalents to provide a unit of measure comparable with the rail shipments. Some quantities of fresh fruits and vegetables are received at terminal markets in loose unpacked form. The weight of these loose unpacked commodities is converted to an equivalent number of a standard container, which in turn is converted to carlot equivalents.

The factors for converting the quantity of fresh fruits and vegetables arriving at terminal markets by motor truck are established by the United States Department of Agriculture to provide a uniform nationwide unit of measure. The conversion factors for avocados are listed below. The Federal-State Market News Service does not attempt to con-

vert packed California flats or Los Angeles lugs of avocados into pounds or tons per car.

California Avocados

California Flat (3¾" or 4½" x 13½" x 16⅛")—	1,750 per carlot
L.A. Lug	900 " "
Loose unpacked avocados	
13 pounds per California Flat	
25 pounds per L.A. Lug	

Florida Avocados

Florida Flat (3¾" x 11½" x 14")	1,300 per carlot

The quantities of avocados shipped out of the State of California by motor truck are tabulated in terms of numbers of packages with no segregation as to the type of package. Considering an approximate average of all types of packages most commonly used, the Federal-State Market News [fol. 44] Service has determined that 1,600 packages of avocados shipped out of the State by motor truck would be approximately equal to one rail carlot.

On the basis of the above weights per container and conversion factors, one carlot equivalent would be equal to approximately 11.3 tons of avocados.

Answer to Interrogatory No. 7:

According to the published records of the Crop Reporting Board of the United States Department of Agriculture, the total production of avocados in California for the crop years 1954-55, 1955-56, and 1956-57, were as follows:

Crop Year	Production of Avocados in California
1954-55	45,200 tons
1955-56	20,000 tons
1956-57	14,700 tons

Answer to Interrogatory No. 8:

According to the published records of the Crop Reporting Board of the United States Department of Agriculture,

the total production of avocados in California and the United States for the crop years 1944-45 to 1956-57 and the percentage California production was of United States production for these crop years is as follows:
[fol. 45]

Crop Year	Production of Avocados in: California Tons	United States Tons	California production as a Percentage of United States Production Percent
1944-45	11,600	17,400	67
1945-46	24,000	27,200	88
1946-47	18,500	20,100	92
1947-48	18,600	20,900	89
1948-49	14,400	17,500	82
1949-50	15,500	20,500	76
1950-51	22,400	27,900	80
1951-52	28,000	34,500	81
1952-53	23,200	31,900	73
1953-54	21,300	31,900	67
Total above 10 Years	197,500	249,800	79
1954-55	45,200	57,000	79
1955-56	20,000	34,300	58
1956-57	14,700	25,500	58

As stated in Interrogatory No. 1, the estimates of the Crop Reporting Board for the State of California are recognized as the official estimates for California by the Director of Agriculture, State of California.

W. C. Jacobsen

Subscribed and sworn to before me this 6th day of March, 1958.

Anne Marie Wise, Notary Public in and for the County of Sacramento, State of California. My Commission Expires February 25, 1960.

TABLE NO. 1

UNLOADS OF AVOCADOS AT LOS ANGELES, SAN FRANCISCO, AND OAKLAND

BY MONTHS, OCTOBER 1954 - SEPTEMBER 1955 INCLUSIVE

Origin	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Total
						Carlot Equivalents 1/							
Los Angeles Unloads:													
Rail - none													
Truck													
California													
Local	14	34	58	83	49	77	52	39	43	29	25	60	563
San Diego County	14	26	60	47	112	162	147	129	89	42	37	29	794
S.Barb-SLO	-	-	-	-	-	-	-	-	10	2	33	7	52
Total California	28	60	118	130	161	239	199	168	142	73	95	96	1,509
Florida	-	11	1	-	-	-	-	-	-	-	-	-	12
Grand Total 1954-55	28	71	119	130	161	239	199	168	142	73	95	96	1,521
San Francisco Unloads:													
Rail - none													
Truck													
California													
Wholesale Market													
L.A. Local District	1	5	7	5	4	9	7	5	7	3	12	3	68
San Diego County	7	9	10	17	9	15	11	13	9	10	4	8	122
Farmers' Market													
San Diego County	-	-	-	-	-	1	1	-	-	-	-	-	2
Total California	8	14	17	22	13	25	19	18	16	13	16	11	192
Florida	2	11	-	-	-	-	-	-	-	-	-	-	13
Grand Total 1954-55	10	25	17	22	13	25	19	18	16	13	16	11	205
Oakland Unloads:													
Rail - none													
Truck													
California													
L.A. Local District	1	1	2	4	3	2	6	6	1	3	5	1	35
San Diego County	4	6	12	15	10	23	11	12	16	10	8	10	137

S.Barb-SLO	-	-	-	-	-	-	-	-	10	2	33	7	52
Total California	28	60	118	130	161	239	199	168	142	73	95	96	1,509
Florida	-	11	1	-	-	-	-	-	-	-	-	-	12
Grand Total 1954-55	28	71	119	130	161	239	199	168	142	73	95	96	1,521

San Francisco Unloads:

Rail - none

Truck

California													
Wholesale Market													
L.A. Local District	1	5	7	5	4	9	7	5	7	3	12	3	68
San Diego County	7	9	10	17	9	15	11	13	9	10	4	8	122
Farmers' Market													
San Diego County	-	-	-	-	-	1	1	-	-	-	-	-	2
Total California	8	14	17	22	13	25	19	18	16	13	16	11	192
Florida	2	11	-	-	-	-	-	-	-	-	-	-	13
Grand Total 1954-55	10	25	17	22	13	25	19	18	16	13	16	11	205

Oakland Unloads:

Rail - none

Truck

California													
L.A. Local District	1	1	2	4	3	2	6	6	1	3	5	1	35
San Diego County	4	6	12	15	10	23	11	12	16	10	8	10	137
Total California	5	7	14	19	13	25	17	18	17	13	13	11	172
Florida	2	18	-	-	-	-	-	-	-	-	-	-	20
Grand Total 1954-55	7	25	14	19	13	25	17	18	17	13	13	11	192

1/ Basis: California Flat (3⅔ or 4½x13½x16 1/8) 1,750; L.A. lug 900; Florida Flat (3⅝x11⅛x14) 1,300 per carlot.

Source: Unload reports for Los Angeles, San Francisco, and Oakland issued by the Federal-State Market News Service.

Federal-State Market News Service
1220 N Street
Sacramento 14, California
February 21, 1958

BY MONTHS, OCTOBER 1955 - SEPTEMBER 1956 INCLUSIVE

Origin	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Total
	- Carlot Equivalents 1/ -												
Los Angeles Unloads:													
Rail - none													
Truck													
California													
Local	37	25	21	47	19	16	17	12	10	12	20	15	247
San Diego County	20	28	40	17	63	68	70	49	25	30	14	7	421
S.Barb-SLO	11	3	1	1	-	1	1	5	4	4	10	13	54
Total California	68	56	62	65	82	85	84	66	39	36	44	35	722
Florida	-	5	2	8	-	-	-	-	-	-	-	-	16
Grand Total 1955-56	68	62	64	73	82	85	84	66	39	36	44	35	738
San Francisco Unloads:													
Rail - none													
Truck													
California													
Wholesale Market													
L.A. Local District	3	4	2	2	3	3	2	3	1	3	6	1	33
San Diego County	7	5	7	10	9	10	10	10	4	4	1	4	81
Farmers' Market													
San Diego County	-	-	-	-	-	-	-	-	-	-	-	-	-
Total California	10	9	9	12	12	13	12	13	5	7	7	5	114
Florida	-	6	5	4	-	-	-	-	-	-	-	-	15
Grand Total 1955-56	10	15	14	16	12	17	12	13	5	7	7	5	129
Oakland Unloads:													
Rail - none													
Truck													
California													
L.A. Local District	1	1	-	-	1	2	2	2	1	2	1	1	14
San Diego County	8	10	9	9	12	11	10	11	4	4	4	5	97
Total California	9	11	9	9	13	13	12	13	5	6	5	6	111
													17

California													
Local	37	35	21	47	19	16	13	12	10	12	20	15	247
San Diego County	20	28	40	17	63	68	70	49	25	30	14	7	421
S.Barb-SLO	11	3	1	1	3	1	1	5	4	4	10	13	54
Total California	68	66	62	65	82	85	84	66	39	36	44	35	722
Florida	-	6	2	8	-	-	-	-	-	-	-	-	16
Grand Total 1955-56	68	62	64	73	82	85	84	66	39	36	44	35	738

San Francisco Unloads:

Rail - none

Truck

California													
Wholesale Market													
L.A. Local District	3	4	2	2	3	3	2	3	1	3	6	1	33
San Diego County	7	5	7	10	9	10	10	10	4	4	1	4	81
Farmers' Market													
San Diego County	-	-	-	-	-	-	-	-	-	-	-	-	-
Total California	10	9	9	12	12	13	12	13	5	7	7	5	114
Florida	-	6	5	4	-	-	-	-	-	-	-	-	15
Grand Total 1955-56	10	15	14	16	12	13	12	13	5	7	7	5	129

Oakland Unloads:

Rail - none

Truck

California													
L.A. Local District	1	1	-	-	1	2	2	2	1	2	1	1	14
San Diego County	8	10	9	9	12	11	10	11	4	4	4	5	97
Total California	9	11	9	9	13	13	12	13	5	6	5	6	111
Florida	-	5	6	5	1	-	-	-	-	-	-	-	17
Grand Total 1955-56	9	16	15	14	14	13	12	13	5	6	5	6	128

1/ Basis: California Flat (3¾ or 4½x13½x16 1/8) 1,750; L.A. Lug 900; Florida Flat (3½x11½x14) 1,300 per carlot.

Source: Unload reports for Los Angeles, San Francisco, and Oakland Issued by the Federal-State Market News Service.

Federal-State Market News Service
1220 N Street
Sacramento 14, California
February 21, 1958

TABLE 3

UNLOADS OF AVOCADOS AT LOS ANGELES, SAN FRANCISCO, AND OAKLAND

BY MONTHS, OCTOBER 1956 - SEPTEMBER 1957 INCLUSIVE

Origin	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Total
						- Carlot Equivalents 1/ -							
Los Angeles Unloads:													
Rail - none													
Truck													
California													
Local	19	9	15										43
L.A. District				14	11	9	8	12	11	9	2	11	87
San Diego County	8	21	33	57	69	87	56	41	38	39	24	23	487
S.Barb-SLO	18	-	1										19
SLO-S.Barb-Vent.				1	5	6	5	7	10	17	14	16	81
Total California	45	30	49	68	84	98	69	60	59	65	40	50	717
Florida	-	5	9	11	1	-	-	-	-	-	-	-	26
Grand Total 1956-57	45	35	58	79	85	98	69	60	59	65	40	50	743
San Francisco Unloads:													
Rail - none													
Truck													
California													
Wholesale Market													
L.A. Local District	1	2	2										5
Los Angeles District				2	4	2	3	3	3	4	-	1	22
San Diego County	3	3	5	7	13	11	12	8	7	6	3	1	79
SLO-S.Barb-Vent.				-	-	-	-	-	-	-	4	4	8
Farmers' Market													
San Diego County	-	-	-	-	-	-	-	-	-	-	-	-	-
Total California	4	5	7	9	17	13	15	11	10	10	6	6	113
Florida	-	2	9	-	-	-	-	-	-	-	-	-	11
Grand Total 1956-57	4	7	16	9	17	17	15	11	10	10	6	6	124
Oakland Unloads:													
Rail - none													
Truck													
California													
L.A. Local District	1	2	1										4

SLO-S.Barb-Vent.													
Total California	45	30	49	68	84	98	69	60	59	65	40	50	717
Florida	-	5	9	11	1	-	-	-	-	-	-	-	26
Grand Total 1956-57	45	35	58	79	85	98	69	60	59	65	40	50	743
San Francisco Unloads:													
Rail - none													
Truck													
California													
Wholesale Market													
L.A. Local District	1	2	2										5
Los Angeles District				2	4	2	3	3	3	4	-	1	22
San Diego County	3	3	5	7	13	11	12	8	7	6	-	1	79
SLO-S.Barb-Vent.				-		-	-	-	-	-	4	4	-
Farmers' Market													
San Diego County	-	-	-	-	-	-	-	-	-	-	-	-	-
Total California	4	5	7	9	17	13	15	11	10	10	6	6	113
Florida	-	2	9	-	-	-	-	-	-	-	-	-	11
Grand Total 1956-57	4	7	16	9	17	17	15	11	10	10	6	6	124
Oakland Unloads:													
Rail - none													
Truck													
California													
L.A. Local District	1	2	1										4
Los Angeles District				1	3	2	3	3	3	-	-	1	16
San Diego County	6	4	6	6	10	8	9	6	5	8	2	1	71
SLO-S.Barb-Vent.										6	2	3	11
Total California	7	6	7	7	13	10	12	9	7	14	4	5	101
Florida	-	4	15	8	-	-	-	-	-	-	-	-	27
Grand Total 1956-57	7	10	22	15	13	10	12	9	7	14	4	5	128

1/ Basis: California Flat (3½ or 4⅛x13½x16 1/8) 1,750; L.A. lug 900; Florida flat (3½x12 7/14) 1,700 per carlot.
Source: Unload reports for Los Angeles, San Francisco, and Oakland issued by the Federal-State Market News Service.

Federal-State Market News Service
1220 P Street
Sacramento, 14, California
February 1, 1958

TABLE 4

OUTBOUND TRUCK PASSINGS OF AVOCADOS THROUGH CALIFORNIA BORDER STATIONS

OCTOBER 1954 - SEPTEMBER 1957 INCLUSIVE

	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Total
						- Carlot Equivalents 1/							
1954-55	24	26	44	79	91	124	115	109	90	54	48	42	846
1955-56	35	29	35	40	54	71	56	48	31	15	17	16	447
1956-57	13	11	15	28	31	45	44	38	33	23	18	16	315

1/ Basis: Lugs and Flats 1,600 per carlot.

Source: Outbound Truck Passings reports issued by the Federal-State Market News Service, Sacramento, California.

[fol. 50] Affidavit of service by mail (omitted in printing).

[fol. 59] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

NOTICE OF AND MOTION FOR DISMISSAL OR ALTERNATIVELY FOR STAY OF PROCEEDINGS AS TO FLORIDA LIME AND AVOCADO GROWERS, INC.—Filed March 14, 1958

To: Plaintiff, Florida Lime and Avocados Growers, Inc., and

To: Isaac E. Ferguson, Esq., Its Attorney:

You, And Each Of You, Will Please Take Notice that on Monday, April 7, 1958, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the defendants above named will move the above-entitled Court for its order dismissing the above-entitled action as to said plaintiff on the following grounds:

I

That plaintiff's complaint fails to allege facts showing a cause of action as to said plaintiff within the equity juris-
[fol. 60] diction of the Federal District Court.

II

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the matter in controversy exceeds the sum or value of $3,000, exclusive of interests and costs within the purview of 28 U.S.C. 1331.

III

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state

facts showing that the action or proceeding arises under any Act of Congress regulating commerce within the purview of 28 U.S.C. 1337.

IV

That the plaintiff Florida Lime and Avocado Growers, Inc.'s complaint fails to state a claim against these answering defendants upon which relief can be granted.

V

That should this Honorable Court retain jurisdiction it should hold the case as to said plaintiff in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.

Defendants' motion to dismiss is based on the pleadings, papers and documents on file with the Court, the affidavits filed herewith, the transcript of Deposition of Fred Piowaty, and the points and authorities stated herein, and the answers to written interrogatories which have been served upon a principal officer of the plaintiff corporation, when said answers have been filed with this Honorable Court.

Edmund G. Brown, Attorney General of the State of California; John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 62]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Jurisdiction and Status of Case

Plaintiff Florida Lime and Avocado Growers, Inc. is a Florida corporation engaged in the business of marketing avocados and other agricultural products grown in Florida. (Plfs. Complaint, Par. I; Deposition of Piowaty, Tr. 249.) By its complaint filed in the District Court of the United States for the Northern District of California, Northern Division, on November 13, 1957, this plaintiff seeks an injunction to restrain the enforcement of section 792, Agricultural Code of California. The complaint names as defendants Goodwin J. Knight, Governor, Edmund G. Brown,

Attorney General, and W. C. Jacobsen, Director of Agriculture, of the State of California.

Plaintiff invokes the jurisdiction of the court under 28 U.S.C. sections 1331 and 1337 and also prays that the case be heard and determined by a three-judge court as provided by 28 U.S.C. sections 2281 and 2284.

In its complaint the plaintiff Florida Lime and Avocado Growers, Inc., attacks the constitutionality of section 792 of the Agricultural Code of California.[1] Plaintiff centers its constitutional attack on the part of section 792 which provides:

> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8% of oil, by weight of the avocado excluding the skin and seed."

The requirement that avocados contain not less than 8% oil was first enacted as part of the Agricultural Code of California in 1925. (Ch. 350, Calif. Stats. 1925).

Plaintiff asserts that the enforcement of section 792 of [fol. 63] the Agricultural Code, when applied to prohibit delivery and sale in California of avocados grown in Florida and shipped in interstate commerce, offends the Commerce Clause (Article 1, section 8, clause 3) and the Equal Protection Clause (Fourteenth Amendment, section 1) of the Constitution of the United States. (Plfs. Complaint, Pars. XXIX, XXX.)

Statement

Plaintiff Florida Lime and Avocado Growers, Inc. was organized in 1937. (*Id.*, Par. I.) It is engaged in the business of marketing avocados and other agricultural products grown in Florida. (*Ibid.*; Deposition of Piowaty, Tr. 249.) Between 1937 and 1954 plaintiff did not market avocados in California. (Deposition of Piowaty, Tr. 260.) It commenced marketing Florida avocados in California in 1954. (*Ibid.*)

In each of the crop years since 1954-1955, this plaintiff corporation has picked, packed, and distributed approximately 60,000 bushels of avocados of average value (FOB Florida) of about $275,000.00. (Plfs. Complaint, Par. XIV.)

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[1] Copies of California statutes and administrative regulations cited herein are attached hereto as Exhibit "B".

Its avocado sales in California for the past three seasons (1955-56, 1956-57, and 1957-58) have represented an average of only 13.53% of its total avocado sales. (Plfs. Ex. 20.) Moreover, the marketing of avocados is only one phase of plaintiff's business operations, apparently not even a major phase. (Deposition of Piowaty, Tr. 249; Objections to Defendants' Interrogatories Propounded to Harold E. Kendall and Fred Piowaty, filed with the Court, p. 3.)

Only a small fraction of Florida avocados shipped to California fail to comply with California's standardization laws. (Affidavit of S. R. Whipple, Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture, Exhibit "A" hereto.) The percentage of all Florida avocados so failing to comply during [fol. 64] the past four market seasons is as follows:

Marketing Season	Total Quantity Shipped into California, in Flats	Percentage Failing to Comply
Oct. 1, 1954-Sept. 30, 1955	58,500	1.01%
Oct. 1, 1955-Sept. 30, 1956	62,400	16.4%
Oct. 1, 1956-Sept. 30, 1957	83,200	2.4%
Oct. 1, 1957-Dec. 31, 1957	26,000	5.9%
	Total Average	**6.4%**

(*Ibid.*)

Upon arrival of a lot of Florida avocados at a terminal market in California, the avocados are inspected by County Agricultural Commissioner inspectors for defects such as insect damage, freezing injury, decay, and rancidity and for oil content (secs. 782, 792, Calif. Agr. Code; secs. 1397, 1397.1, 1397.5, 1397.6, Title 3, Calif. Adm. Code). When the lot of avocados is found not to comply with state standards, the owner or person in possession may recondition the lot by removing the noncomplying fruit (sec. 785, Calif. Agr. Code). If the owner or person in possession prefers, he may obtain a release of the lot in order that he may market the avocados without the state (secs. 785, 830.1, Calif. Agr. Code; 3 Calif. Admin. Code 1366.2; Plfs. Complaint, Par. XXVI). Mere possession of a lot of avocados which fail to comply with the standards of quality imposed by the

California Agricultural Code does not constitute a violation of law (17 Ops. Cal. Atty. Gen. 154, April 20, 1951; 784-785, Calif. Agr. Code). Thus plaintiff exposes itself to no criminal or civil liability by virtue of shipping Florida avocados into the State of California, even though such avocados do not comply with state law.

If the owner or person in possession, after receiving written notice of the noncompliance of the lot of avocados, [fol. 65] chooses neither to recondition nor to dispose of the lot outside the state, the inspecting official files a petition in a California court requesting a court order that the noncomplying lot be abated as a nuisance (sec. 785, Calif. Agr. Code). The court may in its discretion order the lot released, or that it be reconditioned, or that it be disposed of under conditions imposed by the court (sec. 785, Calif. Agr. Code). The owner or person in possession may also file a petition requesting a summary court order that the lot be released to him (sec. 785, Calif. Agr. Code). Only if the owner or person in possession of the noncomplying avocados attempts to sell them to a retailer without inspection, or sells them after receiving notice of the noncompliance and without reconditioning the lot, would a violation occur. Enforcement action by the State could take the form of either a civil action for penalties equaling the value of the fruit, or for misdemeanor, criminal action for fine not exceeding $500.00, or six months' imprisonment. (Secs. 784, 785, 785.6, 831, Calif. Agr. Code).

Plaintiff Florida Lime and Avocado Growers, Inc., has not taken advantage of the opportunity to recondition lots of noncomplying avocados. (Plfs. Complaint, Par. XXIV.) Nor is there any evidence that this plaintiff corporation has sold a noncomplying lot in California. Rather, this plaintiff has followed the practice of shipping lots that fail to pass California's oil content inspection to neighboring markets outside California, thereby avoiding any violation of California law. (*Ibid.*; Deposition of Piowaty, Tr. 268-269.)

Plaintiff Florida Lime and Avocado Growers, Inc. alleges that it is suffering "great economic detriment and irreparable loss" as a result of the California statute. (Plfs. Complaint, Par. XXXI.) Plaintiff measures this alleged

damage by the reduction in anticipated gross return on non-[fol. 66] complying lots reshipped to markets outside California. (Plfs. Complaint, Par. XXVI.) Thus plaintiff Florida Lime and Avocado Growers, Inc. alleges that it made the following shipments in 1955 which were found not to comply with California law and which were sold outside California:

Date	Number of Lugs Rejected	Expected Gross Return on Entire Shipment	Net Yield on Entire Shipment
11/10/55	1129	$2,088.65	$ 711.60
11/12/55	2083	$3,853.55	$1,681.03
11/14/55	2208	$4,084.80	$1,788.20
12/ 8/55	900	$2,200.00	$ 548.00

(*Ibid.*)

On deposition, Mr. Fred Piowaty, Sales Manager of plaintiff Florida Lime and Avocado Growers, Inc., was able to identify only one other shipment which was found not to comply with California law since this plaintiff commenced shipping avocados to California in 1954. (Deposition of Piowaty, Tr. 255; Plfs. Ex. 21.)* This single additional shipment, of which 361 lugs were found not to comply, was made in November, 1957 and apparently was sold outside California at no loss in anticipated gross return. (Deposition of Piowaty, Tr. 258; Plfs. Ex. 21.)

These five rejected lots, totaling 6,681 lugs of avocados, represent only 5.47% of all the avocados shipped to California by plaintiff during the corresponding period from October 1954 to December 1957. (See Defendants' Exhibit [fol. 67] "S" showing that plaintiff shipped a total of 122,078 lugs of avocados to California during the seasons 1954-55, 1955-56, 1956-57 and 1957-58.) Moreover, as noted above (see p. 5 *supra*), shipments to California represent

* Although Mr. Piowaty had a record of only five shipments which were found not to comply, he estimated that plaintiff Florida Lime and Avocado Growers, Inc. had experienced a reduction in anticipated gross return in the amount of $21,000 as a result of selling noncomplying lots outside California between 1954 and January, 1958. (Deposition of Piowaty, Tr. 274-275.)

only 13.53% of plaintiff's total avocado sales. This means that the 6,681 lugs rejected represent only .74%—less than 1%—of plaintiff's total avocado sales during the period in question. And avocados are only one phase, apparently not even a major phase, of plaintiff's business. (See p. 5 *supra.*)

ARGUMENT

I. The Action Should Be Dismissed for Lack of Equity in the Bill.

A. A Federal Court of Equity Will Interfere With the Enforcement of State Laws Only in Exceptional Circumstances Where There Is a Threat of Great and Immediate Irreparable Injury.

This is an equitable action to enjoin state officials from enforcing a state criminal statute.

It is elementary that the power of a court of equity to act is a discretionary one. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593; *Pennsylvania* v. *Williams*, 294 U.S. 176, 185. Even though a court of equity has authority to hear and decide a case on the merits, it should not invoke its jurisdictional powers unless plaintiff has a cause of action in equity. *American Federation of Labor* v. *Watson*, 327 U.S. at 593; *Douglas* v. *Jeannette*, 319 U.S. 157, 162.

Plaintiff, in praying for an injunction restraining defendants as state officers from enforcing laws of California, is seeking a remedy that a federal court of equity will grant only in "exceptional circumstances." *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95. There is a well recog-[fol. 68] nized general policy of the federal courts against interfering with a state's enforcement of its own laws, even though unconstitutional. *American Federation of Labor* v. *Watson, supra; Douglas* v. *Jeannette, supra; Watson* v. *Buck*, 313 U.S. 387; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Spielman Motor Co.* v. *Dodge, supra.* Federal courts are especially reluctant to interfere with the enforcement of state criminal laws. *Douglas* v. *Jeannette*, 319 U.S. at 163; *Spielman Motor Co.* v. *Dodge*, 295 U.S. at 95.

A plaintiff asking a federal court of equity to disturb the delicate balance of our federal-state relations by restraining state officers from the performance of their official acts must pass a "strict test" (*American Federation of Labor* v. *Watson*, 327 U.S. at 593); he must show that interference by the federal chancellor is necessary to prevent "irreparable injury" both "great and immediate." *Spielman Motor Co.* v. *Dodge*, 295 U.S. at 95. Otherwise, plaintiff should first raise his constitutional issues in the state courts. *Ibid.*

This policy of caution on the part of federal courts of equity was stated by Mr. Justice McReynolds in *Fenner* v. *Boykin*, 271 U.S. 240, 243-244:

> "Ex parte Young, 209 U.S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state and must decide when and how this is to be done. The accused should first set up and [fol. 69] rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500."

The same rule was articulated more recently by Mr. Chief Justice Stone in *Douglas* v. *Jeannette*, 319 U.S. 157, 162-164:

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and [fol. 70] equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. Di Giovanni v. Camden F. Ins. Assoc., 296 U.S. 73, Matthews v. Rodgers, 284 U.S. 521, 525, 526, cf. United States ex rel. Kennedy v. Tyler, 269 U.S. 13, Massachusetts State Grange v. Benton, 272 U.S. 525."

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Davis & F. Mfg. Co. v. Los Angeles, 189 U.S. 207, Fenner v. Boykin, 271 U.S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes

of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger or irreparable injury 'both great and immediate.' Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95, and cases cited; Beal v. Missouri P. R. Corp., 312 U.S. 45, 59, and cases cited; Watson v. Buck, 313 U.S. 387; Williams v. Miller, 317 U.S. 599."

[fol. 71] And Mr. Justice Cardozo stated the policy in this way:

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. [Cases cited.]" *Hawks* v. *Hamill*, 288 U.S. 52, 61.

B. Plaintiff Has Failed to Meet the "Strict Test" of Great and Immediate Irreparable Injury.

It is readily apparent that there are not the exceptional circumstances in this case which would justify an exercise of this court's powers of equity. Plaintiff Florida Lime and Avocado Growers, Inc., is not facing a danger of irreparable harm both great and immediate from the enforcement of California's 8% oil content law.

This plaintiff corporation conducts a substantial business marketing several agricultural products other than avocados. (See p. 5, *supra*.) The marketing of avocados apparently is not even a major phase of this plaintiff's business. (See p. 5, *supra*.) Further, plaintiff's avocado sales in California represent on the average only 13.53% of its total avocado sales. (See p. 5, *supra*.) The California statute is not preventing plaintiff from carrying on even this minor fraction of its total business represented by avocado sales in the remote California market. The five re-

[fol. 72] jected shipments plaintiff complains of represent only 5.47% of plaintiff's total shipments to California and .74% of all avocados handled by plaintiff during the period in question. (See p. 8 and 9, *supra*.) Moreover, plaintiff has not attempted to recondition these lots so that they could be sold in California. (See p. 7, *supra*.)

Even if the California avocado market were totally unavailable to plaintiff, it does not appear that plaintiff's business would be seriously threatened. Plaintiff attempted no California sales for the first 17 years of its existence, yet apparently grew and prospered. (See p. 5, *supra*.) There is no allegation that the entire crop of Florida avocados cannot be adequately marketed in the remaining 47 states. Cf. *Alabama* v. *Arizona*, 291 U.S. 286, 292. Indeed, since California is the nation's largest producer of avocados (Plfs. Complaint, Par. XV) and is distant from Florida, it is apparent that its importance as a market for plaintiff's avocados is inherently limited.

Thus we have this picture, when stated most favorably to plaintiff: As to one of its many products in one of its many markets it is inconvenienced but not prevented from doing business. This falls far short of irreparable injury both great and immediate. It perhaps would be more appropriate to characterize any such damages as "slight" and "inconsequential." *Douglas* v. *Jeannette*, 319 U.S., at 163.

Plaintiff is certainly suffering no greater inconvenience than the plaintiff in *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89. There the plaintiff was seeking to enjoin enforcement of a state-adopted code of unfair competition regulating plaintiff's business practices as a retail dealer in automobiles. The Supreme Court held that the bill should have been dismissed for failure to state a case within the equitable jurisdiction of the District Court. The Court found an absence of a danger of irreparable harm both great and immediate such as would constitute the exceptional circum-[fol. 73] stances which would justify an interference with the enforcement of state laws. Mr. Chief Justice Hughes, writing the opinion for a unanimous Court, stressed that plaintiff had a large business which could be continued under the statute without prohibition or serious interference. He stated:

> "The bill alleged that appellant had a large business in buying and selling motor vehicles but the statute did not prohibit the continuance of that business and the bill gave no facts to show that the particular requirements of the Code, which were in question, would create such a serious interference as to require equitable relief." *Id.* at 96.

Plaintiff seeks to enjoin enforcement of a state statute. Yet it is questionable whether plaintiff Florida Lime and Avocado Growers, Inc. has suffered any damages whatsoever from the enforcement or a threat of enforcement of the 8% oil content statute. The statute has not been enforced against the plaintiff, and, significantly, plaintiff has not alleged that defendants have threatened enforcement. This is understandable since plaintiff has not, evidently, sold any noncomplying avocados in California. Rather it has, voluntarily and without any court or administrative order, reshipped the noncomplying lots to markets outside California. If there was a reduction in plaintiff's gross return, it was a result of plaintiff's voluntary compliance with the law, rather than enforcement or threat of enforcement of the law. Any damage could not, therefore, be the result of any such enforcement or threatened enforcement. Defendants of course stand ready to perform their duties, but

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity." *Watson v. Buck*, 313 U.S. 387, 400.

[fol. 74] C. Plaintiff Should First Attack the Statute in the State Courts or by State Administrative Action.

In the complete absence of "exceptional circumstances" which would warrant equitable interference with state law enforcement, plaintiff

> "should first set up and rely upon his defense in the state courts, even though this involves a challenge of

> the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Fenner* v. *Boykin*, 271 U.S. 240, 244.

There would, of course, be opportunity for review of the federal issues by the United States Supreme Court. *Douglas* v. *Jeannette*, 319 U.S. 157, 167; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95-96.

Plaintiff has had, for many years and yet today, ample opportunities in the California courts to challenge the validity of the 8% oil content statute by an action for declaratory relief (sec. 1060, Calif. Code Civ. Proc.) or by petitioning for an order to show cause why a particular seized lot should not be released (sec. 785, Calif. Agr. Code). Plaintiff could expose itself to a nuisance action, a civil action for penalties, or a misdemeanor prosecution (secs. 784, 785, 785.6, 831, Calif. Agr. Code) simply by selling in California a single shipment of Florida avocados which have failed to comply with the 8% standard. In any such action plaintiff could challenge the constitutional validity of the statute by way of defense. *Douglas* v. *Jeannette, supra; Spielman Motor Co.* v. *Dodge, supra.*

Plaintiff could proceed in the state courts without any disruption of its normal business routine. By selling one noncomplying lot in California, plaintiff would subject itself to a single enforcement action, thereby avoiding the [fol. 75] danger of multiplicity of prosecutions. Cf. *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 85.

Apparently plaintiff feels that it has a right to protection from a federal court of equity from even a single criminal prosecution in the state courts. But the contrary is true:

> "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

In addition to judicial remedies, plaintiff may have available an administrative remedy under state law. Plaintiff's alleged difficulties with meeting the California standard could be alleviated or entirely removed through action of the state Director of Agriculture in establishing emergency standards which supplement or supersede section 792 of the California Agricultural Code. The Director is authorized to promulgate such emergency standards by section 790.5 of the same Code. A remedy before a state administrative agency must be exhausted before resort may be had to the federal courts. *First National Bank* v. *Board of Commissioners*, 264 U.S. 450, 454.

D. A Further Reason for Dismissing the Action Is the Presence of Unsettled Issues of State Law Which Could Moot the Constitutional Issues.

A further reason why this federal court of equity should dismiss the bill and leave plaintiff to the state courts is the presence of antecedent state law issues which should be resolved by the state courts before the constitutional [fol. 76] issues are decided. *Douglas* v. *Jeannette*, 319 U.S. 157; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Gregg* v. *Winchester*, 173 F. 2d 512, *certiorari denied*, 338 U.S. 847; *Bradford* v. *Hurt*, 84 F. 2d 722. In *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596, the Supreme Court explained why federal courts of equity should avoid deciding constitutional issues which may become academic upon the resolution of issues of state law.

> "As we have said, the District Court passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution, which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitu-

tional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

There are at least three issues of state law which plaintiff could and should present to the state courts. (See p. 22, *infra.*) The resolution of any one of these issues in plaintiff's favor would moot the constitutional issues.

E. Conclusion: The Bill Should Be Dismissed for Lack of Equity.

The final evidence of the lack of equity in the bill is that the plaintiff has conducted its business for many years in the face of California's 8% oil content law without feeling [fol. 77] the need to seek relief from a federal court of equity. The statute was enacted in 1925. (See p. 4, *supra.*) Plaintiff began its business operations in 1937. (See p. 5, *supra.*) Not until 1954 did plaintiff begin marketing avocados in California. (See p. 5, *supra.*) And not until November 1957 did plaintiff seek relief from this federal court of equity. Any delay that might be occasioned by litigating the issues in the state courts would be insignificant when compared with the delay resulting from plaintiff's own inaction. The bill should be dismissed for lack of equity.

II. Plaintiff's Complaint Fails to Show That the Matter in Controversy Exceeds the Sum or Value of $3,000 Within the Purview of 28 U.S.C. 1331.

Plaintiff Florida Lime and Avocado Growers, Inc. asserts that its action is within the jurisdiction of the Court by virtue of 28 U.S.C. 1331 in that it arises under the commerce clause of Article 1, Section 8, and the equal protection clause of the United States Constitution, and that as to each plaintiff, the matter in controversy exceeds the value of $3,000.00 (Plfs. Complaint, Par. III). In determining whether the requisite jurisdictional amount is in controversy, where it does not appear that the plaintiff is absolutely prevented by state law from conducting its business, the decisive question is not the value or net worth of the business but the value of the right to be free from regula-

tion (*Kroger Grocery Co.* v. *Lutz*, 299 U.S. 300). Paragraph XXX, plaintiff's complaint, alleges that the California statute in question limits the California market for the avocados marketed by the plaintiff "at great economic detriment and irreparable loss" (Plfs. Complaint, p. 15, 11. 4-5). However, the complaint fails to state facts sufficient to warrant such legal conclusions. For example, paragraph XXVI, plaintiff's complaint alleges that the [fol. 78] Florida Lime and Avocado Growers, Inc. made shipments in 1955 which were found not to comply with California law and which were sold outside of California, not apparently at any out-of-pocket loss to plaintiff, but merely at a reduction in anticipated gross returns. (See p. 8, *supra*.)

This reduction in anticipated gross returns during the year 1955 avail the plaintiff nothing for purposes of meeting the requirements of 28 U.S.C. 1331 because "past losses cannot be used to build up the jurisdictional requirement in an action for an injunction to restrain enforcement of the [state] statute. *Dunning* v. *Agricultural Prorate Advisory Comm.*, 38 F. Supp. 393, 394 (District Court N.D., California, S.D.). It appears doubtful whether plaintiff Florida Lime and Avocado Growers, Inc. had any connection with these 1955 shipments which were made by its predecessor 1937 cooperative which was reorganized as a corporation for profit in 1956, a year after these shipments were made (Plfs. Complaint, Par. I). It follows that the plaintiff Florida Lime and Avocado Growers, Inc. has not alleged any facts in its complaint showing that the right to be free of regulation by section 792, California Agricultural Code, is of the value of $3,000 within the jurisdictional prerequisites of 28 U.S.C. 1331.

III. Plaintiff's Complaint Fails to Show That the Action or Proceeding Arises Under Any Act of Congress Regulating Commerce Within the Purview of 28 U.S.C. 1337.

Plaintiff's complaint alleges that section 792, California Agricultural Code, is unconstitutional when applied to avo-

cados delivered for sale in interstate commerce in compliance with standards established by the Secretary of Agriculture, pursuant to the Federal Marketing Agreement Act of 1937 (Plfs. Complaint, Par. XXX). However an analysis of the federal act discloses that it authorizes cooperative federal-state action in the field of agricultural [fol. 79] marketing (7 U.S.C. 610(i)). Thus federal marketing orders may cover the same geographical area as a state regulation covering the same area and commodity without causing preemption of the field as a matter of law.

Federal Marketing Orders	State Marketing Orders
Marketing Order Governing Dried Figs Produced in California, 7 C.F.R. 964	Marketing Order for Dried Figs, issued effective July 22, 1953
Marketing Order Governing Beurre d'Anjou, Beurre Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau Varieties of Pears Grown in Oregon, Washington, and California, 7 C.F.R. 939	Marketing Order for Fresh Fall and Winter Pears Grown in California, issued effective August 26, 1951 Marketing Order for Fresh Bartlett Pears, issued effective August 9, 1939.

In the instant case, however, there is not even geographic overlapping of federal and state legislative action since the federal marketing order governing avocados grown in South Florida is applicable only to "the handling of avocados grown in the designated production area" of "the counties of Brevard, Osceola, Polk, Hillsborough, and Pinellas in the State of Florida, and all of the counties of that state situated south of such counties" (Plfs. Complaint, Ex. A; 7 C.F.R. 969(3), 969.4). This marketing order further provides that "The said order is limited in its application to the smallest regional production area that is practicable . . . " (Plfs. Complaint, Ex. A; 7 C.F.R. 969(3)). Under these circumstances, defendants respectfully submit that the Federal Marketing Agreement Act of 1947 does not invalidate state action in the field of agricultural mar- [fol. 80] keting, and that as a matter of law the Secretary

of Agriculture did not intend to preempt the field of avocado marketing regulation in promulgating the federal Florida Avocado Marketing Order. *Parker* v. *Brown*, 317 U.S. 341, 358; cf. *Townsend* v. *Yeomans*, 301 U.S. 441, *Reed* v. *Colorado*, 187 U.S. 137. It follows that plaintiff's allegations of conflict between the state and federal regulation of avocados stands as a mere colorable allegation which fails to comply with the requirements of 27 U.S.C.A. 1337. *Levering Co.* v. *Morrin*, 289 U.S. 103, 105; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 361.

IV. Alternatively, This Honorable Court Should Hold the Case in Abeyance Pending an Authoritative Interpretation of California Law by California Courts.

Federal courts of equity in the exercise of a sound discretion should avoid passing on substantial constitutional issues concerning the meaning of California statutes and regulations which have never been construed by the California courts, *American Federation of Labor* v. *Watson*, 327 U.S. 582. When authoritatively construed, section 792, California Agricultural Code, may or may not have the meaning or force which plaintiff assumes that it has. In the absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What this Honorable District Court might decide on federal constitutional issues might hereafter turn out to be an academic and needless dissertation. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596.

There are present in this case issues of interpretation of California law which plaintiffs should raise before the Director of Agriculture, and in the California courts.

Plaintiff's complaint alleges that the matter in controversy is the right of plaintiff to market Florida avocados in California free from restriction of section 792, Agricul- [fol. 81] tural Code (Plfs. Complaint, Par. III). This allegation raises the antecedent issue of state law whether this statute was intended by the California legislature to apply to avocados moving into California while in interstate commerce, or whether it was to apply only to sales of

avocados in intrastate commerce. Cf. *Bourjois* v. *Chapman*, 301 U.S. 183. So far as defendants can ascertain, there are no California judicial decisions construing the reach of this statute. This question of statutory interpretation, which could moot the constitutional issues, can be determined with finality only by the California courts (*American Federation of Labor* v. *Watson*, 327 U.S. 582).

Plaintiff's complaint suggests another issue of state law which could be submitted to the California courts. This is the issue whether California's avocado standardization law was intended by the state legislature to apply to avocados grown in another state and marketed pursuant to a Federal Marketing Order promulgated under the Agricultural Marketing Act of 1937.

Still a third issue of state law which plaintiff should present to the California courts is the validity under the California statute (sec. 782, Calif. Agr. Code) of the implementing regulation establishing the official method of securing samples from lots of avocados and the method of chemical analysis of oil content. (3 Calif. Adm. Code sections 1397.5, 1397.6.) Cf. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496.

Defendants would endeavor in the state court to establish the validity of these regulations and statutes under state law and their applicability to plaintiff's avocados shipped from Florida. But defendants recognize that other possible interpretations exist and that plaintiff can and should present these questions to a state court before asking a federal court of equity to rule on speculatory federal constitutional questions. If plaintiff was successful in establishing its case in the state courts on these issues there [fol. 82] would be no need for this Honorable Court to rule on the posed federal questions.

In light of these uncertain issues of state law, this Honorable Court should, if it does not dismiss the action, remit the parties to the California courts for resolution of the state law questions. *American Federation of Labor* v. *Watson*, 327 U.S. 582, *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, *East Coast Lumber Co.* v. *Babylon*, 174 F. 2d 106.

Wherefore, defendants respectfully pray that the complaint of the plaintiff, Florida Lime and Avocado Growers, Inc. be dismissed or alternatively that the action be stayed pending the resolution of issues of state law by the California courts.

Edmund G. Brown, Attorney General of the State of California; John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 83]

EXHIBIT "A" TO MOTION

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Defendants.

AFFIDAVIT OF S. R. WHIPPLE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Comes now S. R. WHIPPLE and deposes and says:

That he is Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture; that he has held said position since August, 1945; that

in such position he is charged with the duty of supervising the inspection work performed by inspectors of the Bureau of Fruit and Vegetable Standardization and the California County Agricultural Commissioners and their staffs in the [fol. 84] inspection of avocados found in California wholesale terminal markets in the enforcement of section 792 of the California Agricultural Code, which requires that avocados offered for sale, among other things, also must meet a minimum oil content requirement of eight per cent (8%).

That official records maintained by the federal-state market news service, California Department of Agriculture, show that during the respective marketing seasons the following quantities of avocados were shipped from Florida and unloaded in the California wholesale market terminals at Los Angeles, San Francisco, and Oakland, California:

Marketing Season	Destination				
	L.A.	S.F.	Oakland	Total Carloads	Total Flats
Oct 1, 1954-Sept. 30, 1955	12	13	20	45	58,500
Oct. 1, 1955-Sept. 30, 1956	16	15	17	48	62,400
Oct. 1, 1956-Sept. 30, 1957	26	11	27	64	83,200
Oct. 1, 1957-Dec. 31, 1957	2	2	16	20	26,000

Source: Unload Reports for Los Angeles, San Francisco and Oakland as issued by Federal-State Market News Service. Other markets not reported. Conversions: 1300 flats per carload.

that he is informed and believes and on such information and belief alleges that these quantities account for substantially all of the Florida avocados shipped into California during the period of time from October 1, 1954 through December 31, 1957.

That the official records of the Bureau of Fruit and Vegetable Standardization, California Department of Agriculture, disclose the following rejections of containers of Florida avocados in California because the lots of avocados tested failed to comply with the eight per cent (8%) oil standard set forth in section 792, California Agricultural Code:

[fol. 85]

Marketing Season	Flats	Percent of Total*
Oct. 1, 1954-Sept. 30, 1955	591	1.0%
Oct. 1, 1955-Sept. 30, 1956	10284	16.4%
Oct. 1, 1956-Sept. 30, 1957	1867	2.4%
Oct. 1, 1957-Dec. 31, 1957	1540	5.9%

* Percentage obtained by dividing flats rejected in each season by the flats received for the same period each season.

/s/ S. R. WHIPPLE
S. R. Whipple

Subscribed and sworn to
before me this 3d day
of March, 1958.

/s/ LAURA M. MIDDLETON
Notary Public in and for the
County of Sacramento,
State of California.

(Seal)

[fol. 86]

EXHIBIT "B" TO MOTION

COPIES OF CALIFORNIA STATUTES AND ADMINISTRATIVE REGULATIONS CITED IN THESE POINTS AND AUTHORITIES

Cal. Agr. Code, Sec. 782, provides:

"The director and the commissioners of each county of the State, their deputies and inspectors, under the supervision and control of the director shall enforce this chapter. The refusal of any officer authorized under this chapter to carry out the orders and directions of the director in the enforcement of this chapter is neglect of duty.

The director may prescribe methods of selecting samples of lots or containers of fruits, nuts and vegetables on a basis of size or other specific classification, which shall be reasonably calculated to produce by such sampling fair

representations of the entire lots or containers sampled; establish and issue official color charts depicting the color standards and requirements established in this chapter; and make such other rules and regulations as are necessary to secure uniformity in the enforcement of this chapter.

Any sample taken under the provisions of this chapter shall be prima facie evidence, in any court in this State, of the true condition of the entire lot in the examination of which said sample was taken. A written notice of violation, issued by a duly qualified representative of the director or by commissioners, their deputies and inspectors holding valid standardization certificates of eligibility as enforcing officers of this chapter, stating that a certain lot of produce is in violation of the provisions of this chapter and based upon the examination of such sample, shall be prima facie evidence, in any court in this State, of the true condition of the entire lot."

[fol. 87] Cal. Agr. Code, Sec. 784, provides:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provision of this chapter."

Cal. Agr. Code, Sec. 785, provides:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or

dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this [fol. 88] section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within

the county, that the lot is held, and that notice of non-[fol. 89] compliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

Cal. Agr. Code, Sec. 785.6, provides:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty [fol. 90] in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a

marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

Cal. Agr. Code, Sec. 790.5, provides:

"Whenever, upon petition of persons interested in the growing or handling of fruits, nuts or vegetables, or upon his own motion the director finds that any provision of this chapter relating to standards for any commodity or type of container, or relating to any markings required on any container, or any arrangement of the produce within a container, is difficult or impossible of performance by reason of laws or orders promulgated by authority of the Government of the United States, or because of scarcity of materials, labor, or equipment used in the production or marketing of any commodity regulated by this chapter, or that any such provision of this chapter results in serious waste of useful produce otherwise available for human consumption or in serious waste of other resources, or prevents utilization of new technological developments, to the serious disadvantage of California producers, he may establish emergency standards for any such commodity or container, or for the marking of containers, or for the arrangement of produce within the container; and until expiration as hereinafter provided, such emergency standards shall be in full force and effect, notwithstanding any other provision of this chapter, and all provisions of this chapter applying to [fol. 91] standards shall apply to such emergency standards in lieu of the standards set forth in this chapter.

All emergency standards established under the provisions of this section shall be reasonably calculated to effectuate the purposes of the standards which they supersede. No emergency standards shall be established which tend to raise or lower any standards relating to the maturity or to the carrying or keeping quality of any commodity, and no emergency standards shall be construed to modify in any respect any provision of this chapter designed to prevent deception or mislabeling, or designed to prevent the marketing of produce which is unwholesome or which would fail to give consumer satisfaction.

All emergency standards issued under the provisions of this section, before they may become effective, shall be published in one or more newspapers, trade papers, or industry publications deemed best adapted to give notice to interested persons, together with a notice of the time and place for hearing objections. Such hearing shall be not less than 10 nor more than 20 days from the date of publication. Notice of hearing shall be mailed not less than 10 days prior to the date of the hearing to all persons who theretofore have filed with the director a request for notice of such hearings. If at the hearing it shall be developed by competent testimony that additional time will be required to produce further essential evidence the director shall continue the hearing to a date which will allow sufficient time for the production of such evidence. At the hearing, interested parties shall be heard and a record kept of the proceedings for determination by the director of the facts shown at the hearing. The director, upon his findings on the facts shown at the hearing, shall rescind, modify or affirm the emergency standards as published; and such emergency stand-
[fol. 92] ards shall take effect on the day appointed therefor, and shall continue in effect until suspended or rescinded by the director, or until the ninety-first day after adjournment of the next regular session of the Legislature, whichever first occurs.

Emergency standards may be amended, suspended, or rescinded upon notice and hearing in the same manner as provided for the establishment of such standards."

Cal. Agr. Code, Sec. 792, provides:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Cal. Agr. Code, Sec. 830.1, provides:

"The enforcing officer may, and when requested by an enforcing officer of the county of destination shall, affix a warning notice to any vehicle or other means of transportation, or to any load or lot, of fruits, nuts, or vegetables which do not conform to the standards established by this chapter, whether or not exempt from such standards, and serve a disposal order upon the owner or person having custody or possession of any such load or lot.

The warning notice, the disposal order directing the [fol. 93] proper disposition of such products, and the disposal order receipt to be signed by an enforcing officer at destination confirming such disposition shall be in the form specified by and provided by the director.

The enforcing officer at the point of destination of such load or lot shall determine that the load or lot has been delivered to the consignee at the destination specified in the order and shall thereupon release the load or lot and countersign the disposal order receipt so given to him. He shall immediately forward the receipt to the enforcing officer who served the disposal order."

Cal. Agr. Code, Sec. 831, provides:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

[fol. 94] Cal. Agr. Code, Title 3, Sec. 1366.2, provides:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of

the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or remarked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

[fol. 95] Cal. Adm. Code, Title 3, Sec. 1397, provides:

"*Avocados, Freezing Injury.* Discoloration due to freezing shall be considered to be a defect causing a waste of 10 percent or more, by weight, of the entire avocado, including skin and seed if:

(a) A brown color is apparent on any amount of the outside surface of the skin, and there is a discolored ring or layer of flesh adjacent to the skin, which has a water-soaked appearance, and this ring or layer extends over an area equal to 10 percent or more of the surface of the avocado; or

(b) Abnormal and distinct discoloration or desiccation of the flesh occurs on a transverse cut made through the blossom end of the fruit at the base of the seed, or through the neck of the fruit at a point at least one inch from the stem end, or on either such cut surface if it covers an aggregate area of (1) not less than 5/16 of an inch in diameter when applied to an avocado weighing 5 ounces or less, including skin and seed, or (2) not less than 1/2 of an inch in diameter when applied to an avocado weighing more than 5 but less than 10 ounces, including skin and seed, or (3) not less than 3/4 of an inch in diameter when applied to an avocado weighing 10 ounces or more, including skin and seed; or

(c) Fifteen or more bundles of fibres (spots) which are black appear on either surface of a transverse cut made through the fruit at a point 1/2 the distance between the stem end and the distal end of the fruit. (Rev. 5/57)"

Cal. Adm. Code, Title 3, Sec. 1397.1, provides:

"*Avocados, Number of Avocados to Select to Inspect for Frost Damage.* The number of containers of avocados from which fruit is to be sampled is provided in Section 1367, [fol. 96] California Administrative Code. The following is in addition to the above-named section:

(a) When it is evident from the outside appearance of the avocados in the lot that freezing damage has occurred to the avocados, a random sample is not necessary.

(b) When freezing damage is not evident from the outside appearance of the avocados in a lot, the following method shall be used:

(1) When 5 containers or less are selected, inspect 10 avocados which have been selected at random from all containers in the sample. If 1 of these fruits is considered rejectable under Section 792 of the Agricultural Code, and Section 1397 of the Administrative Code, inspect an additional 10 avocados selected from the same containers in the same manner. When more than 5 percent, by count, of these 20 fruits are considered rejectable, the lot shall be considered in violation.

(2) When 6 or more containers are selected, inspect 20 avocados which have been selected at random from all containers in the sample. When more than 5 percent, by count, of these 20 fruits are considered rejectable, the lot shall be considered in violation.

(3) When avocados have been sized, each size must be tested as a separate lot; when not sized, test large, medium and small fruits as separate lots.

(c) When avocados have been selected under method (a), the fruit, or the results of testing them, shall not be combined in any way with those selected to be tested under method (b). (Rev. 5/57)"

Cal. Adm. Code, Title 3, Sec. 1397.5, provides:

"*Avocados, Determination of Oil Content.* The method of [fol. 97] determining oil content in avocados shall be the method as described in the 'Official Method for the Determination of Oil in Avocados', issued by the Bureau of Chemistry of the State Department of Agriculture, and published in the 1st quarterly, 1955 Bulletin of the State of California, Department of Agriculture, Volume XLIV, Number 1."

Cal. Adm. Code, Title 3, Sec. 1397.6, provides:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	Sample Containers
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-[fol. 98] test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5/57)"

Exhibit to Motion

(See opposite) ☞

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OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

RAYMOND H. SWEET, Chemist

Bureau of Chemistry, California Department of Agriculture

Section 792 of the Agricultural Code of the State of California provides, in part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." The maturity of an avocado is of considerable importance; an avocado of insufficient maturity is likely to shrivel and rot while softening and will lack the desirable flavor found in more mature fruit. Appraising the maturity of an avocado by visual inspection is of some importance but even expert judgment fails in many instances. Factors considered in such inspection are general ground color, number and nature of surface spots, conditions of stem, and when cut the thickness and color of seed coat and condition of seed. Growing conditions in the orchard at time of picking are of some importance, too.

The primary standard method for measuring the oil in avocados is by ethyl ether extraction from the dried avocado pulp in a Soxhlet extractor. This method is time-consuming and involves direct weighing of the oil. In 1928 Lesley and Christie [1] described a shorter method, calibrated against results obtained by ether extraction, for more rapid determination of the oil content of avocados. This method involves grinding the fresh avocado pulp with Halowax oil (technical monochloronaphthalene) and measuring the refractive index of the avocado oil and the Halowax oil mixture. The index thus obtained is given meaning by a parallel determination of oil content by actual ether extraction. By obtaining a series of such values and constructing a graph each small change in refractive index could be represented by the proper change in percent oil.

The work of Lesley and Christie [1] was brief and rather incomplete. In 1949 A. F. Shannon [2], after considerable work and research in collaboration with a Bureau of Chemistry Staff member, revised the oil content-refractive index chart published in *The Bulletin* [2] and this appears now as Table 1 in this publication. The method established for ether extraction is also described in the A. F. Shannon paper [2].

APPARATUS AND SOLUTIONS REQUIRED

Portable food chopper with nut butter cutter (fine) blade or Acme Safety Grater

Power grinder, type Figure (1) or type Figure (2)

Grinding Shell with two steel balls
Spatula (small)
Knife, three-inch blade
Pipette, 5 ml. (all glass automatic type may also be used)
Filter paper (soft), drip coffee maker type
Halowax oil No. 1000, Fisher Scientific Company or equivalent
Ethyl ether
Tweezers
Abbe type refractometer and attachments (water circulated)
Lens light or suitable instrument light
Large watch glass or pie tin
Balance, sensitive to 10 milligrams, capacity 5 to 100 grams
Small electric heater or hot water bath

Halowax Oil. The index of refraction of different lots of Halowax oil may vary as much as 0.002 and may also change with age or exposure to light. The index of refraction of each lot used should be obtained and corrected to 25 degrees C., as described below under "Calculation—Halowax Oil Correction."



FIGURE 1. Power grinder type 1 removed from drum housing showing grinding shells in position. Operating time 10 minutes per sample. Specifications available from California Department of Agriculture.

Power Grinders. The later type grinder shown in Figure 1 has faster action than grinders formerly used and an operating time of 10 minutes has been found sufficient for the hardest fruits encountered. If the type in Figure 2 is used, 15 minutes operation is recommended.

Grinding Shells. Shell material of monel is preferred; steel balls should be well seated at the ends of cylinder. The cylinder seals must be protected from damage and reground when necessary to form an excellent seal. The steel balls should be one-eighth inch less in diameter than the shell cylinder. Complete specifications for construction of grinding shell may be obtained from California Department of Agriculture.



FIGURE 2. Power grinder type 2 showing one grinding shell in position. Operating time 15 minutes per sample. Specifications available from California Department of Agriculture.

PREPARATION OF SAMPLE

Sample Preparation Using Portable Food Chopper. Dice to about one-half inch cubes the entire fruit excluding the skin, seed and seed coat. This may be facilitated by first quartering the fruit lengthwise. After thoroughly mixing the cubes, transfer all or a portion (size of fruit determining) of the mass slowly through a clean and dry food chopper. Careful operation will prevent juices from being lost. Collect the pulp on a pie tin or suitable dish. Thoroughly mix the pulp and as rapidly as possible weigh 5 grams to the nearest 10 milligrams on a piece of soft filter paper in a weighing dish. Filter papers used in drip coffee makers are satisfactory. Transfer the weighed sample together with filter paper into the special grinding shell containing one ball bearing. Wipe the weighing dish with a piece of soft filter paper and place this into the shell, followed by the second ball bearing. Pipette exactly 5 ml. of Halowax oil into the shell. Keep shell in vertical position until cap is fastened tightly with wrench to avoid leakage.

Sample Preparation Using Acme Safety Grater. Clean and dry the grater. Cut the avocado lengthwise into homologous (mirror image) halves. A portion of the skin and seed coat on one-half along the larger perimeter is removed and the cut face pressed and moved in a rotary manner across the grater until a fair amount of the avocado pulp is collected on a pie tin or suitable dish below. Always see that depth of grating is equal from stem to calyx end of half-section. After thoroughly mixing the pulp, weigh 5 grams, transfer to the grinding shell, and add exactly 5 ml. Halowax oil as described in the preceding paragraph.

TREATMENT OF THE FIVE GRAM SAMPLE IN SHELL

Clamp the shell containing the 5 gram sample and 5 ml. Halowax oil into the power grinding machine. Operating periods for the different

types of shaker devices differ but in any case the resulting paste formed in the shell should be a smooth uniform paste. Upon any evidence of incomplete maceration the sample should be discarded. Large chunks in the weighed pulp may often cause this condition.

Transfer the bulk of the mixture by means of a small spatula to a pie tin or large watch glass and squeeze out the liquid by pressing and kneading with the spatula. The separation is facilitated by gently heating for a short period on a hot water bath. Extended heating must be avoided because Halowax oil is appreciably volatile at the temperature of a hot water bath.

Cool the oil mixture and transfer a few drops to the refractometer prism. Avoid touching hard objects to the prism surface. Follow operating instructions for make of instrument used. Refractometer temperature should have been previously stabilized to 25 degrees C. by means of water circulating through the instrument. A constant temperature circulating system is convenient if available.

Read the index of refraction of the Halowax oil mixture to the fourth decimal figure.

CALCULATIONS

Temperature Correction: If the reading is taken at any temperature other than 25 degrees C. a correction must be applied by adding 0.0004 for every full degree above 25 degrees C. or subtracting 0.0004 for every degree below 25 degrees C. Fractions of a degree to the nearest one-fourth should be compensated accordingly.

Halowax Oil Correction: If the index of refraction of Halowax oil used is less than 1.6353 the difference is added to the reading on the sample; if greater the difference is substracted from the refractometer reading. The resulting figure is "corrected refractive index." With use of this corrected reading obtain the percent oil in avocado from the table.

Sample Calculation

Reading obtained on refractometer at 24.5 degrees C. = 1.6155
Temperature correction = −0.0002
Reading corrected to 25 degrees C. = 1.6153
Index of refraction of Halowax oil used corrected to 25 degrees C. = 1.6348
Standard correction = (1.6353 − 1.6348) = 0.0005 to be added
Final "corrected refractive index" (1.6153 + 0.0005) = 1.6158

Reference to Table 1 shows this figure corresponds to 12.1 percent oil in the avocado under examination.

CLEANING OF REFRACTOMETER

The prism surfaces of the refractometer should be cleaned after each determination by first wiping gently or blotting with either lens paper, clean cotton or softest facial tissue; then clean with another piece soaked in ether and finally wiping clean with a third piece such that the surface of the measuring prism appears bright.

CHANGE IN REFRACTIVE INDEX OF HALOWAX OIL CAUSED BY THE AVOCADO OIL EXTRACTED

(Based on Halowax Oil Nd. 1.6353 at 25 Degrees C.)

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
1.6281	4.0	1.6218	8.0	1.6159	12.0
.6280	4.1	.6216	8.1	.6158	12.1
.6278	4.2	.6214	8.2	.6157	12.2
.6277	4.3	.6213	8.3	.6155	12.3
.6275	4.4	.6211	8.4	.6153	12.4
.6273	4.5	.6210	8.5	.6152	12.5
.6272	4.6	.6208	8.6	.6151	12.6
.6270	4.7	.6207	8.7	.6149	12.7
.6269	4.8	.6205	8.8	.6148	12.8
.6267	4.9	.6204	8.9	.6146	12.9
1.6265	5.0	1.6202	9.0	1.6145	13.0
.6264	5.1	.6201	9.1	.6143	13.1
.6262	5.2	.6199	9.2	.6142	13.2
.6260	5.3	.6198	9.3	.6141	13.3
.6259	5.4	.6196	9.4	.6139	13.4
.6257	5.5	.6195	9.5	.6137	13.5
.6255	5.6	.6193	9.6	.6136	13.6
.6254	5.7	.6192	9.7	.6135	13.7
.6252	5.8	.6190	9.8	.6133	13.8
.6250	5.9	.6189	9.9	.6132	13.9
1.6249	6.0	1.6187	10.0	1.6131	14.0
.6247	6.1	.6186	10.1	.6129	14.1
.6245	6.2	.6184	10.2	.6127	14.2
.6244	6.3	.6183	10.3	.6126	14.3
.6243	6.4	.6182	10.4	.6125	14.4
.6241	6.5	.6180	10.5	.6123	14.5
.6239	6.6	.6179	10.6	.6121	14.6
.6237	6.7	.6178	10.7	.6120	14.7
.6236	6.8	.6176	10.8	.6118	14.8
.6234	6.9	.6175	10.9	.6117	14.9
1.6232	7.0	1.6173	11.0	1.6116	15.0
.6231	7.1	.6172	11.1	.6115	15.1
.6229	7.2	.6171	11.2	.6113	15.2
.6228	7.3	.6169	11.3	.6111	15.3
.6226	7.4	.6168	11.4	.6110	15.4
.6225	7.5	.6166	11.5	.6109	15.5
.6223	7.6	.6165	11.6	.6107	15.6
.6222	7.7	.6163	11.7	.6106	15.7
.6220	7.8	.6162	11.8	.6105	15.8
.6219	7.9	.6161	11.9	.6103	15.9

REFERENCES

(1) B. E. Lesley and A. W. Christie, Ind. Eng. Chem. Anal. Ed., Vol. 1, No. 1 (1929) p. 24.

(2) A. F. Shannon, Bulletin, Calif. Dept. of Agriculture, Vol. XXXVIII, No. 3, (1949) p. 127.

(3) Bulletin, Calif. Dept. of Agriculture, Vol. XXXVI, No. 1, (1947) p. 20.

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[fol. 104] Affidavit of Service by Mail (omitted in printing).

[fol. 105] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

[Title omitted]

No. 7648 Civil Action

NOTICE OF AND MOTION FOR DISMISSAL OR ALTERNATIVELY FOR STAY OF PROCEEDINGS AS TO SOUTH FLORIDA GROWERS ASSOCIATION, INC.—Filed March 14, 1958

To: Plaintiff, South Florida Growers Association, Inc., and

To: Isaac E. Ferguson, Esq., Its Attorney:

You, And Each Of You, Will Please Take Notice that on Monday, April 7, 1958, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the defendants above named will move the above-entitled Court for its order dismissing the above-entitled action as to said plaintiff on the following grounds:

I

That plaintiff's complaint fails to allege facts showing a cause of action as to said plaintiff within the equity juris-[fol. 106] diction of the Federal District Court.

II

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the matter in controversy exceeds the sum or value of $3,000, exclusive of interests and costs within the purview of 28 U. S. C. 1331.

III

That this Honorable Court lacks jurisdiction of this suit as to said plaintiff for failure of the complaint to state facts showing that the action or proceeding arises under any Act of Congress regulating commerce within the purview of 28 U. S. C. 1337.

IV

That the plaintiff South Florida Growers Association, Inc.'s complaint fails to state a claim against these answering defendants upon which relief can be granted.

V

That should this Honorable Court retain jurisdiction it should hold the case as to said plaintiff in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.

Defendants' motion to dismiss is based on the pleadings, papers and documents on file with the Court, the affidavits filed herewith, the transcript of Deposition of Harold E. Kendall, and the points and authorities stated herein, and the answers to written interrogatories which have been served upon a principal officer of the plaintiff corporation, when said answers have been filed with this Honorable Court.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 108]

Points and Authorities in Support of Motion

Jurisdiction and Status of Case

Plaintiff South Florida Growers Association, Inc. is a Florida corporation engaged in the business of marketing avocados and other agricultural products grown in Florida. (Plfs. Complaint, Par. I; Deposition of Kendall, Tr. 159.) By its complaint filed in the District Court of the United States for the Northern District of California, Northern Division, on November 13, 1957, this plaintiff seeks an injunction to restrain the enforcement of section 792, Agricultural Code of California. The complaint names as defendants Goodwin J. Knight, Governor, Edmund G. Brown, Attorney General, and W. C. Jacobsen, Director of Agriculture, of the State of California.

Plaintiff invokes the jurisdiction of the court under 28 U. S. C. sections 1331 and 1337 and also prays that the case be heard and determined by a three-judge court as provided by 28 U. S. C. sections 2281 and 2284.

In its complaint the plaintiff South Florida Growers Association, Inc., attacks the constitutionality of section 792 of the Agricultural Code of California.[1] Plaintiff centers its constitutional attack on the part of section 792 which provides:

> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8% of oil, by weight of the avocado excluding the skin and seed."

The requirement that avocados contain not less than 8% [fol. 109] oil was first enacted as part of the Agricultural Code of California in 1925 (Ch. 350, Calif. Stats. 1925).

Plaintiff asserts that the enforcement of section 792 of the Agricultural Code, when applied to prohibit delivery and sale in California of avocados grown in Florida and shipped in interstate commerce, offends the Commerce

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[1] Copies of California statutes and administrative regulations cited herein are attached hereto as Exhibit "B" to defendants' Motion to Dismiss the complaint of plaintiff Florida Lime and Avocado Growers, Inc.

Clause (Article 1, section 8, clause 3) and the Equal Protection Clause (Fourteenth Amendment, section 1) of the Constitution of the United States. (Plfs. Complaint, Pars. XXIX, XXX.)

Statement

Plaintiff South Florida Growers Association, Inc. was organized in 1953. (*Id.*, Par. I.) From 1939 to 1953 the same business was operated as a partnership under the name of Florida Growers Association. (*Ibid.*) It is engaged in the business of marketing avocados and other agricultural products grown in Florida. (*Ibid.*; Deposition of Kendall, Tr. 160.) Between 1939 and 1954 this plaintiff did not market avocados in California. (Deposition of Kendall, Tr. 169.) It commenced marketing Florida avocados in California in October, 1954. (*Ibid.*)

In each of the crop years since 1954-1955 this plaintiff has handled approximately 35% to 40% of the avocados grown and marketed in Florida, viz.: 1954-55, 166,818 bushels; 1955-56, 206,308 bushels; 1956-57, 144,048 bushels; 1957-58, to October 23, 1957, 74,500 bushels, and estimated for the remainder of the 1957-58 season 100,550 bushels. (Plfs. complaint, par. XIV.) The estimated value of the avocados handled and to be handled by this plaintiff in the 1957-58 season is approximately $800,000. (*Ibid.*)

Of the total of 698,802 bushels of avocados handled by plaintiff South Florida Growers Association, Inc., beginning with the crop year 1954-1955, 34,905 bushels have been sold in California. (Plfs. Ex. 19; Deposition of Kendall, Tr. 201.) Thus the California sales represent only 4.99% [fol. 110] of the total. Moreover, the marketing of avocados is only one phase of this plaintiff's business, apparently not even a major phase. (Deposition of Kendall, Tr. 159-160; Objections to Defendants' Interrogatories Propounded to Harold E. Kendall and Fred Piowaty, filed with the Court, p. 3.)

Only a small fraction of Florida avocados shipped to California fail to comply with California's standardization laws. (Affidavit of S. R. Whipple, Assistant Chief, Bureau of Fruit and Vegetable Standardization, California De-

partment of Agriculture, Exhibit "A" hereto.) The percentage of all Florida avocados so failing to comply during the past four mark ' seasons is as follows:

Marketing Season	Total Quantity Shipped into California, in Flats	Percentage Failing to Comply
Oct. 1, 1954-Sept. 30, 1955	58,500	1.01%
Oct. 1, 1955-Sept. 30, 1956	62,400	16.4%
Oct. 1, 1956-Sept. 30, 1957	83,200	2.4%
Oct. 1, 1957-Dec. 31, 1957	26,000	5.9%
	Total Average	6.4%

(*Ibid.*)

Upon arrival of a lot of Florida avocados at a terminal market in California, the avocados are inspected by County Agricultural Commissioner inspectors for defects such as insect damage, freezing injury, decay, and rancidity and for oil content (secs. 782, 792, Calif. Agr. Code; secs. 1397, 1397.1, 1397.5, 1397.6, Title 3, Calif. Adm. Code). When the lot of avocados is found not to comply with state standards, the owner or person in possession may recondition the lot by removing the noncomplying fruit (sec. 785, Calif. Agr. Code). If the owner or person in possession prefers, he may obtain a release of the lot in order that he may market the avocados without the state (secs. 785, 830.1, Calif. Agr. Code; 3 Calif. Admin. Code 1366.2; Plfs. Com-[fol. 111] plaint, Par. XXVI). Mere possession of a lot of avocados which fail to comply with the standards of quality imposed by the California Agricultural Code does not constitute a violation of law (17 Ops. Cal. Atty. Gen. 154, April 20, 1951; secs. 784-785, Calif. Agr. Code). Thus plaintiff exposes itself to no criminal or civil liability by virtue of shipping Florida avocados into the State of California, even though such avocados do not comply with state law.

If the owner or person in possession, after receiving written notice of the noncompliance of the lot of avocados, chooses neither to recondition nor to dispose of the lot out-

side the state, the inspecting official files a petition in a California court requesting a court order that the noncomplying lot be abated as a nuisance (sec. 785, Calif. Agr. Code). The court may in its discretion order the lot released, or that it be reconditioned, or that it be disposed of under conditions imposed by the court (sec. 785, Calif. Agr. Code). The owner or person in possession may also file a petition requesting a summary court order that the lot be released to him (sec. 785, Calif. Agr. Code). Only if the owner or person in possession of the noncomplying avocados attempts to sell them to a retailer without inspection, or sells them after receiving notice of the noncompliance and without reconditioning the lot, would a violation occur. Enforcement action by the State could take the form of either a civil action for penalties equaling the value of the fruit, or for misdemeanor criminal action for fine not exceeding $500.00, or six months' imprisonment (Secs. 784, 785, 785.6, 831, Calif. Agr. Code).

Plaintiff South Florida Growers Association, Inc., has not taken advantage of the opportunity to recondition lots of noncomplying avocados. (Plfs. Complaint, Par. XXIV.) Nor is there any evidence that this plaintiff corporation has sold a noncomplying lot in California. Rather, this [fol. 112] plaintiff has followed the practice of shipping lots that fail to pass California's oil content inspection to neighboring markets outside California, thereby avoiding any violation of California law. (Plfs. Complaint, pars. XXIV, XXVII.)

Plaintiff South Florida Growers Association, Inc. alleges that it is suffering "great economic detriment and irreparable loss" as a result of the California statute. (Plfs. Complaint, Par. XXXI.) Plaintiff measures this alleged damage by the reduction in anticipated gross return on noncomplying lots reshipped to markets outside California. (Plfs. Complaint, Pars. XXVI, XXVII.) Thus Harold E. Kendall, president of plaintiff South Florida Growers Association, Inc., testified on deposition in January, 1958, that in the four years his company had been marketing avocados in California, seven shipments had failed to pass the California oil content inspection. (Deposition of Ken-

dall, Tr. 175-176.) Mr. Kendall introduced Plaintiffs' Exhibit 17 summarizing these seven shipments. (*Id.* at 176.) Exhibit 17 reflects that in the seven shipments 2311 lugs were rejected and reshipped to other markets at a reduction in anticipated gross return of $2226.47. The Exhibit summarizes the seven shipments as follows:

Date	Total Shipments in Lugs	Number of Lugs Rejected	Reduction from Anticipated Gross Return on Entire Shipment
11/10/54	449	118	$ 59.85
11/11/54	1300	529	394.20
11/12/54	650	97	75.39
11/18/54	650	72	24.89
11/16/55	677	282	210.62
11/29/56	1550	721	821.62
11/14/57	1795	492	639.90

The 2311 lugs of avocados which were rejected in these seven shipments represent only 1.84% of the total of [fol. 113] 34,905 bushels of avocados marketed by plaintiff in California during the four seasons in question.[1] Moreover, as noted above (see pp. 5-6 *supra*), shipments to California represent only 4.99% of plaintiff's total avocado sales during the four seasons beginning with the 1954-1955 season. This means that the 2311 lugs which failed to pass California's challenged oil content test represent a mere .09% of this plaintiff's total avocado sales during the four crop years in question. And avocados are only one phase, not necessarily even a major phase, of this plaintiff's business. (See p. 6 *supra*.)

[1] To compute this percentage, bushels have been converted to lug box equivalents. (3.6 lug boxes = 1 bushel.)

ARGUMENT

I. The Action Should Be Dismissed for Lack of Equity in the Bill.

A. A Federal Court of Equity Will Interfere with the Enforcement of State Laws Only in Exceptional Circumstances Where There Is a Threat of Great and Immediate Irreparable Injury.

This is an equitable action to enjoin state officials from enforcing a state criminal statute.

It is elementary that the power of a court of equity to act is a discretionary one. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185. Even though a court of equity has authority to hear and decide a case on the merits, it should not invoke its jurisdictional powers unless plaintiff has a cause of action in equity. *American Federation of Labor* v. *Watson*, 327 U. S. at 593; *Douglas* v. *Jeannette*, 319 U. S. 157, 162.

Plaintiff, in praying for an injunction restraining defendants as state officers from enforcing laws of California, [fol. 114] is seeking a remedy that a federal court of equity will grant only in "exceptional circumstances". *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. There is a well recognized general policy of the federal courts against interfering with a state's enforcement of its own laws, even though unconstitutional. *American Federation of Labor* v. *Watson*, *supra*; *Douglas* v. *Jeannette*, *supra*; *Watson* v. *Buck*, 313 U. S. 387; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Spielman Motor Co.* v. *Dodge*, *supra*. Federal courts are especially reluctant to interfere with the enforcement of state criminal laws. *Douglas* v. *Jeannette*, 319 U. S. at 163; *Spielman Motor Co.* v. *Dodge*, 295 U. S. at 95.

A plaintiff asking a federal court of equity to disturb the delicate balance of our federal-state relations by restraining state officers from the performance of their official acts must pass a "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. at 593); he must show that interference by the federal chancellor is necessary to prevent "irreparable injury" both "great and immediate". *Spielman Motor Co.* v. *Dodge*, 295 U. S. at 95. Otherwise,

plaintiff should first raise his constitutional issues in the state courts. *Ibid.*

This policy of caution on the part of federal courts of equity was stated by Mr. Justice McReynolds in *Fenner* v. *Boykin*, 271 U. S. 240, 243-244:

> "Ex parte Young, 209 U. S. 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with [fol. 115] the duty of prosecuting offenders against the laws of the state and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some Federal court. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500."

The same rule was articulated more recently by Mr. Chief Justice Stone in *Douglas* v. *Jeannette*, 319 U. S. 157, 162-164:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial

of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases [fol. 116] which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. Di Giovanni v. Camden F. Ins. Asso., 296 U. S. 73, Matthews v. Rodgers, 284 U. S. 521, 525, 526, cf. United States ex rel. Kennedy v. Tyler, 269 U. S. 13, Massachusetts State Grange v. Benton, 272 U. S. 525."

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, Fenner v. Boykin, 271 U. S. 240. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'. Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 95, and cases cited; Beal v. Missouri P. R. Corp., 312 U. S. 45, 49, and cases [fol. 117] cited; Watson v. Buck, 313 U. S. 387; William v. Miller, 317 U. S. 599."

And Mr. Justice Cardozo stated the policy in this way:

> "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. [Cases cited.]" *Hawks* v. *Hamill*, 288 U. S. 52, 61.

B. Plaintiff Has Failed to Meet the "Strict Test" of Great and Immediate Irreparable Injury.

It is readily apparent that there are not the exceptional circumstances in this case which would justify an exercise of this court's powers of equity. Plaintiff South Florida Growers Association, Inc. is not facing a danger of irreparable harm both great and immediate from the enforcement of California's 8% oil content law.

This plaintiff corporation conducts a substantial business marketing avocados and other agricultural products. (See p. 5, *supra*.) The marketing of avocados apparently is not even a major phase of this plaintiff's business. (See p. 6, *supra*.) Further, plaintiff's avocado sales in California represent on the average only 4.99% of its total avocado sales. (See pp. 5-6, *supra*.) The California statute is not preventing plaintiff from carrying on even this minor fraction of its total business represented by avocado sales in the remote California market. The seven lots rejected [fol. 118] since the 1954-1955 crop year represent only 1.84% of plaintiff's total shipments to California and .09% of all avocados handled by plaintiff during the period in question. (See pp. 8-9, *supra*.) Moreover, plaintiff has not attempted to recondition these lots so that they could be sold in California. (See p. 7, *supra*.)

Even if the California avocado market were totally unavailable to plaintiff, it does not appear that plaintiff's business would be seriously threatened. Plaintiff attempted

no California sales for the first 15 years of its existence, yet apparently grew and prospered. (See p. 5, *supra*.) There is no allegation that the entire crop of Florida avocados cannot be adequately marketed in the remaining 47 states. Cf. *Alabama* v. *Arizona*, 291 U. S. 286, 292. Indeed, since California is the nation's largest producer of avocados (Plfs. Complaint, Par. XV) and is distant from Florida, it is apparent that its importance as a market for plaintiff's avocados is inherently limited.

Thus we have this picture, when stated most favorably to plaintiff: As to one of its many products in one of its many markets it is inconvenienced but not prevented from doing business. This falls far short of irreparable injury both great and immediate. It perhaps would be more appropriate to characterize any such damages as "slight" and "inconsequential". *Douglas* v. *Jeannette*, 319 U. S., at 163.

Plaintiff is certainly suffering no greater inconvenience than the plaintiff in *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89. There the plaintiff was seeking to enjoin enforcement of a state-adopted code of unfair competition regulating plaintiff's business practices as a retail dealer in automobiles. The Supreme Court held that the bill should have been dismissed for failure to state a case within the equitable jurisdiction of the District Court. The Court found an absence of a danger of irreparable harm both great and [fol. 119] immediate such as would constitute the exceptional circumstances which would justify an interference with the enforcement of state laws. Mr. Chief Justice Hughes, writing the opinion for a unanimous Court, stressed that plaintiff had a large business which could be continued under the statute without prohibition or serious interference. He stated:

> "The bill alleged that appellant had a large business in buying and selling motor vehicles but the statute did not prohibit the continuance of that business and the bill gave no facts to show that the particular requirements of the Code, which were in question, would create such a serious interference as to require equitable relief." *Id.* at 96.

Plaintiff seeks to enjoin enforcement of a state statute. Yet it is questionable whether plaintiff South Florida Growers Association, Inc. has suffered any damages whatsoever from the enforcement or a threat of enforcement of the 8% oil content statute. The statute has not been enforced against the plaintiff, and, significantly, plaintiff has not alleged that defendants have threatened enforcement. This is understandable since plaintiff has not, evidently, sold any noncomplying avocados in California. Rather it has, voluntarily and without any court or administrative order, reshipped the noncomplying lots to markets outside California. If there was a reduction in plaintiff's gross return, it was a result of plaintiff's voluntary compliance with the law, rather than enforcement or threat of enforcement of the law. Any damage could not, therefore, be the result of any such enforcement or threatened enforcement. Defendants of course stand ready to perform their duties, but

> "A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity." *Watson* v. [fol. 120] *Buck*, 313 U. S. 387, 400.

C. Plaintiff Should First Attack the Statute in the State Courts or by State Administrative Action.

In the complete absence of "exceptional circumstances" which would warrant equitable interference with state law enforcement, plaintiff

> "should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Fenner* v. *Boykin*, 271 U. S. 240, 244.

There would, of course, be opportunity for review of the federal issues by the United States Supreme Court. *Douglas* v. *Jeannette*, 319 U.S. 157, 167; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95-96.

Plaintiff has had, for many years and yet today, ample opportunities in the California courts to challenge the

validity of the 8% oil content statute by an action for declaratory relief (sec. 1060, Calif. Code Civ. Proc.) or by petitioning for an order to show cause why a particular seized lot should not be released (sec. 785, Calif. Agr. Code). Plaintiff could expose itself to a nuisance action, a civil action for penalties, or a misdemeanor prosecution (secs. 784, 785, 785.6, 831, Calif. Agr. Code) simply by selling in California a single shipment of Florida avocados which have failed to comply with the 8% standard. In any such action plaintiff could challenge the constitutional validity of the statute by way of defense. *Douglas* v. *Jeannette, supra; Spielman Motor Co.* v. *Dodge, supra.*

Plaintiff could proceed in the state courts without any disruption of its normal business routine. By selling one noncomplying lot in California, plaintiff would subject itself to a single enforcement action, thereby avoiding the [fol. 121] danger of multiplicity of prosecutions. Cf. *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Spielman Motor Co.* v. *Dodge*, 295 U.S. 85.

Apparently plaintiff feels that it has a right to protection from a federal court of equity from even a single criminal prosecution in the state courts. But the contrary is true:

> "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

In addition to judicial remedies, plaintiff may have available an administrative remedy under state law. Plaintiff's alleged difficulties with meeting the California standard could be alleviated or entirely removed through action of the State Director of Agriculture in establishing emergency standards which supplement or supersede section 792 of the California Agricultural Code. The Director is authorized to promulgate such emergency standards by section 790.5 of the same Code. A remedy before a state admin-

istrative agency must be exhausted before resort may be had to the federal courts. *First National Bank* v. *Board of Commissioners*, 264 U.S. 450, 454.

D. A Further Reason for Dismissing the Action Is the Presence of Unsettled Issues of State Law Which Could Moot the Constitutional Issues.

A further reason why this federal court of equity should dismiss the bill and leave plaintiff to the state courts is the presence of antecedent state law issues which should be resolved by the state courts before the constitutional [fol. 122] issues are decided. *Douglas* v. *Jeannette*, 319 U.S. 157; *Beal* v. *Missouri Pac. R. Co.*, 312 U.S. 45; *Gregg* v. *Winchester*, 173 F.2d 512, *certiorari denied*, 338 U.S. 847; *Bradford* v. *Hurt*, 84 F.2d 722. In *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596, the Supreme Court explained why federal courts of equity should avoid deciding constitutional issues which may become academic upon the resolution of issues of state law.

> "As we have said, the District Court passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution, which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

There are at least three issues of state law which plaintiff could and should present to the state courts. (See pp. 22-23, *infra*.) The resolution of any one of these issues in plaintiff's favor would moot the constitutional issues.

E. Conclusion: The Bill Should Be Dismissed for Lack of Equity.

The final evidence of the lack of equity in the bill is that the plaintiff has conducted its business for many years in the face of California's 8% oil content law without feeling [fol. 123] the need to seek relief from a federal court of equity. The statute was enacted in 1925. (See p. 4, *supra.*) Plaintiff began its business operations in 1939. (See p. 5, *supra.*) Not until 1954 did plaintiff begin marketing avocados in California. (See p. 5, *supra.*) And not until November 1957 did plaintiff seek relief from this federal court of equity. Any delay that might be occasioned by litigating the issues in the state courts would be insignificant when compared with the delay resulting from plaintiff's own inaction. The bill should be dismissed for lack of equity.

II. Plaintiff's Complaint Fails to Show that the Matter in Controversy Exceeds the Sum or Value of $3,000 Within the Purview of 28 U.S.C. 1331.

Plaintiff South Florida Growers Association, Inc. asserts that its action is within the jurisdiction of the Court by virtue of 28 U.S.C. 1331 in that it arises under the commerce clause of Article 1, Section 8, and the equal protection clause of the United States Constitution, and that as to each plaintiff, the matter in controversy exceeds the value of $3,000.00 (Plfs. Complaint, Par. III). In determining whether the requisite jurisdictional amount is in controversy, where it does not appear that the plaintiff is absolutely prevented by state law from conducting its business, the decisive question is not the value or net worth of the business but the value of the right to be free from regulation (*Kroger Grocery Co.* v. *Lutz*, 299 U.S. 300). Paragraph XXX, plaintiff's complaint, alleges that the California statute in question limits the California market for the avocados marketed by the plaintiff "at great economic detriment and irreparable loss" (Plfs. Complaint, p. 15, 11, 4-5). However, the complaint fails to state facts sufficient to warrant such legal conclusions. The complaint fails to allege any facts regarding the sustaining of any

[fol. 124] actual losses by the South Florida Growers Association, Inc., other than a general statement that some shipments "were rejected". (Plfs. Complaint, Par. XXVII.) It follows that this plaintiff has not alleged any facts in its complaint showing that the right to be free of regulation by section 792, California Agricultural Code, is of the value of $3,000 within the jurisdictional prerequisites of 28 U.S.C. 1331.

III. Plaintiff's Complaint Fails to Show that the Action or Proceeding Arises Under Any Act of Congress Regulating Commerce Within the Purview of 28 U.S.C. 1337.

Plaintiff's complaint alleges that section 792, California Agricultural Code, is unconstitutional when applied to avocados delivered for sale in interstate commerce in compliance with standards established by the Secretary of Agriculture, pursuant to the Federal Marketing Agreement Act of 1937 (Plfs. Complaint, Par. XXX). However, an analysis of the federal act discloses that it authorizes cooperative federal-state action in the field of agricultural marketing (7 U.S.C. 610[i]). Thus federal marketing orders may cover the same geographic area as a state regulation covering the same area and commodity without causing preemption of the field as a matter of law.

Federal Marketing Orders	State Marketing Orders
Marketing Order Governing Dried Figs Produced in California, 7 C.F.R. 964	Marketing Order for Dried Figs, issued effective July 22, 1953
Marketing Order Governing Beurre d'Anjou, Beurre Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Clairgeau Varieties of Pears Grown in Ore- [fol. 125] gon, Washington, and California, 7 C.F.R. 939	Marketing Order for Fresh Fall and Winter Pears Grown in California, issued effective August 26, 1951 Marketing Order for Fresh Bartlett Pears, issued effective August 9, 1939.

In the instant case, however, there is not even geographic overlapping of federal and state legislative action

since the federal marketing order governing avocados grown in South Florida is applicable only to "the handling of avocados grown in the designated production area" of "the counties of Brevard, Osceola, Polk, Hillsborough, and Pinellas in the State of Florida, and all of the counties of that state situated south of such counties" (Plfs. Complaint, Ex. A; 7 C.F.R. 969[3], 969.4). This marketing order further provides that "The said order is limited in its application to the smallest regional production area that is practicable . . ." (Plfs. Complaint, Ex. A; 7 C.F.R. 969[3]). Under these circumstances, defendants respectfully submit that the Federal Marketing Agreement Act of 1937 does not invalidate state action in the field of agricultural marketing, and that as a matter of law the Secretary of Agriculture did not intend to preempt the field of avocado marketing regulation in promulgating the federal Florida Avocado Marketing Order. *Parker* v. *Brown*, 317 U.S. 341, 358; cf. *Townsend* v. *Yeomans*, 301 U.S. 441, *Reed* v. *Colorado*, 187 U.S. 137. It follows that plaintiff's allegations of conflict between the state and federal regulation of avocados stands as a mere colorable allegation which fails to comply with the requirement of 27 U.S.C.A. 1337. *Levering Co.* v. *Morrin*, 289 U.S. 103, 105; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 361.

IV. Alternatively, this Honorable Court Should Hold the Case in Abeyance Pending an Authoritative Interpretation of California Law by California Courts.

[fol. 126] Federal courts of equity in the exercise of a sound discretion should avoid passing on substantial constitutional issues concerning the meaning of California statutes and regulations which have never been construed by the California courts, *American Federation of Labor* v. *Watson*, 327 U.S. 582. When authoritatively construed, section 792, California Agricultural Code, may or may not have the meaning or force which plaintiff assumes that it has. In the absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What this Honorable District Court might decide on federal constitutional issues might hereafter turn out to be an academic and needless disser-

tation. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596.

There are present in this case issues of interpretation of California law which plaintiffs should raise before the Director of Agriculture, and in the California courts.

Plaintiff's complaint alleges that the matter in controversy is the right of plaintiff to market Florida avocados in California free from restriction of section 792, Agricultural Code (Plfs. Complaint, Par. III). This allegation raises the antecedent issue of state law whether this statute was intended by the Cailfornia legislature to apply to avocados moving into California while in interstate commerce, or whether it was to apply only to sales of avocados in intrastate commerce. Cf. *Bourjois* v. *Chapman*, 301 U.S. 183. So far as defendants can ascertain, there are no California judicial decisions construing the reach of this statute. This question of statutory interpretation, which could moot the constitutional issues, can be determined with finality only by the California courts (*American Federation of Labor* v. *Watson*, 327 U.S. 582).

Plaintiff's complaint suggests another issue of state law which could be submitted to the California courts. This is [fol. 127] the issue whether California's avocado standardization law was intended by the state legislature to apply to avocados grown in another state and marketed pursuant to a Federal Marketing Order promulgated under the Agricultural Marketing Act of 1937.

Still a third issue of state law which plaintiff should present to the California courts is the validity under the California statute (sec. 782, Calif. Agr. Code) of the implementing regulation establishing the official method of securing samples from lots of avocados and the method of chemical analysis of oil content. (3 Calif. Adm. Code sections 1397.5, 1397.6.) Cf. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496.

Defendants would endeavor in the state court to establish the validity of these regulations and statutes under state law and their applicability to plaintiff's avocados shipped from Florida. But defendants recognize that other possible interpretations exist and that plaintiff can and should present these questions to a state court before asking a federal court of equity to rule on speculatory federal

constitutional questions. If plaintiff was successful in establishing its case in the state courts on these issues there would be no need for this Honorable Court to rule on the posed federal questions.

In light of these uncertain issues of state law, this Honorable Court should, if it does not dismiss the action, remit the parties to the California courts for resolution of the state law questions. *American Federation of Labor* v. *Watson*, 327 U.S. 582, *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, *East Coast Lumber Co.* v. *Babylon*, 174 F. 2d 106.

WHEREFORE, defendants respectfully pray that the complaint of the plaintiff, South Florida Growers Association, Inc. be dismissed or alternatively that the action be stayed [fol. 128] pending the resolution of issues of state law by the California courts.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 129]

EXHIBIT "A" TO MOTION

Affidavit of S. R. Whipple—March 3, 1958 (Copy)

Omitted. Printed side folio 83, page 79 ante.

[fol. 132] Affidavit of Service by Mail (omitted in printing).

[fol. 137] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

AMENDED ANSWER—Filed March 20, 1958

Come now W. C. Jacobsen, Director of Agriculture, State of California, Goodwin J. Knight, Governor of the State of

California, and Edmund G. Brown, Attorney General, State of California, and with leave of court first had and obtained file this their amended answer to plaintiffs' complaint as amended by interlineation, and for their causes of defense allege as follows:

First Defense

That said complaint fails to state a claim against these answering defendants upon which relief can be granted.

[fol. 138]

Second Defense

That the above-entitled court lacks jurisdiction over the subject matter set forth in plaintiffs' said complaint, or at all.

Third Defense

That these answering defendants admit the allegations contained in paragraphs II, V, VI, VIII, IX, X, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' said complaint; that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VII, XII, XIII, XIV, XXII, XXIV(a), XXV and XXVII of plaintiffs' said complaint and on said ground deny the truth of each and every allegation contained in said paragraphs; that these answering defendants deny each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVIII, XXIX, XXX, XXXI, and XXXII of plaintiffs' said complaint; that these answering defendants admit the allegations contained in lines 29 to 32, page 7, and lines 1 to 10, page 8, ending with "February," of paragraph XV of plaintiffs' said complaint, and deny each and every allegation contained in lines 10 to 19, page 8, beginning with "Thus" on line 10, page 8, and ending with "California" on line 19, page 8, of paragraph XV of plaintiffs' said complaint; that these answering defendants deny each and every allegation contained in paragraph XXVI of plaintiffs' said complaint excepting that defendants admit that they have in the past and now stand ready to perform their duties under their oath of office should they acquire knowledge of violations of the Agricultural Code of the State of California.

Fourth Defense

That the federal courts have adopted the salutary policy [fol. 139] of judicial self-restraint in suspending or enjoining enforcement of state statutes alleged to be unconstitutional on the ground that a complaint might be civilly or criminally prosecuted for violation of them, where the state court, which has the last word on the construction and meaning of the statute, has never passed upon the statute attacked. In the absence of a showing that the danger of irreparable loss is both great and immediate, plaintiffs herein should first set up the invalidity of the statute in the state court, even though the validity of the statute is challenged, since there is ample opportunity for ultimate review by the United States Supreme Court of federal questions after decision by the state court.

Fifth Defense

That the quality and maturity standards purportedly promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R. 969), the promulgation, and the methods and procedures used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act, of 1937, as amended (7 U.S.C.A. 601 et seq.).

Sixth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesame avocados, thus maintaining the industry reputation, and consumer and trade market [fol. 140] demand, for mature, wholesome, nutritious avocados.

WHEREFORE, defendants pray:

1. That the plaintiffs' said complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendants be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendants their costs.

Dated: February 26, 1958.

Edmund G. Brown, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 174] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ANSWERS OF HAROLD E. KENDALL, PRESIDENT OF PLAINTIFF SOUTH FLORIDA GROWERS ASSOCIATION, INC., TO DEFENDANTS' INTERROGATORIES—Filed April 8, 1958

Interrogatory No. 1: What was the net worth of South Florida Growers Association, Inc. as of the close of its last fiscal year, March 31, 1957?
Answer: $18,255.64.

Interrogatory No. 2: What was the net worth of South Florida Growers Association, Inc. as of December 31, 1957?
Answer: No statement of net worth as of December 31, 1957 is available, since no audit was made as of this date.

The accountants of the corporation, Bolger & Fisher of Miami, Florida, have advised me that it would be extremely difficult to make an estimate of net worth as of a date other than the close of a fiscal year, since there is not available an inventory as of such date, nor a list of accounts payable or of expenses accrued as of such date, nor sum- [fol. 175] mary of amounts receivable on sales and consignments, nor book entries or data from which taxes and overhead applicable to the period could be accurately estimated. The reason for using a fiscal year ending March 31st is that the business of the corporation reduces sharply after the middle of Februa , so that by March 31st there is a minimum of incompleted transactions. The accountants advise further that an audit, as of the end of a nine-months' period, would cost the corporation about $1,500, merely to obtain a questionable estimate of net worth at that time.

Interrogatory No. 3: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1955?
Answer: $1,476,353.07.

Interrogatory No. 4: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1956?
Answer: $1,660,492.97.

Interrogatory No. 5: What were the gross receipts of South Florida Growers Association, Inc. from all business during the fiscal year ending March 31, 1957?
Answer: $1,718,098.70.

Interrogatory No. 6: What were the gross receipts of South Florida Growers Association, Inc. from all business from April 1, 1957 to December 31, 1957?
Answer: No such figure is available and no dependable estimate could be made. (See answer to Interrogatory No. 2.)

Interrogatory No. 7: What were the gross receipts of [fol. 176] South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1955?
Answer: $820,068.00.

Interrogatory No. 8: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1956?
Answer: $993,409.00.

Interrogatory No. 9: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the fiscal year ending March 31, 1957?
Answer: $1,006,241.00.

Interrogatory No. 10: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados during the period from April 1, 1957 to December 31, 1957?
Answer: No such figure is available and no dependable estimate could be made. (See answer to Interrogatory No. 2.)

Interrogatory No. 11: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1955?
Answer: $78,905.31.

Interrogatory No. 12: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California in the fiscal year ending March 31, 1956?
Answer: $129,543.11.

Interrogatory No. 13: What were the gross receipts of South Florida Growers Association, Inc. from the sale of [fol. 177] avocados in California during the fiscal year ending March 31, 1957?
Answer: $15,065.68.

Interrogatory No. 14: What were the gross receipts of South Florida Growers Association, Inc. from the sale of avocados in California during the period from April 1, 1957 to December 31, 1957?
Answer: $11,861.78.

Harold E. Kendall

Duly sworn to by Harold E. Kendall, jurat omitted in printing.

[fol. 178] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ANSWERS OF FRED PIOWATY, SECRETARY OF PLAINTIFF FLORIDA LIME AND AVOCADO GROWERS, INC., TO DEFENDANTS' INTERROGATORIES—Filed April 8, 1958

Interrogatory No. 1: What was the net worth of Florida Lime and Avocado Growers, Inc. as of the close of its last fiscal year, March 31, 1957?
Answer: $100,760.64.

Interrogatory No. 2: What was the net worth of Florida Lime and Avocado Growers, Inc. as of December 31, 1957?
Answer: No statement of net worth as of December 31, 1957 is available, since no audit was made as of this date, but only at the close of the fiscal year on March 31, 1957. Affiant is advised by the company's accountants that a net worth figure as of December 31, 1957 could be approximated only by a complete audit of the company's financial condition on that date; that such audit would necessarily include qualifications as to various items not known or ascertainable [fol. 179] as of the end of a nine-months' period such as April 1, 1957 to December 31, 1957; that such audit would take about six weeks and cost about $2,000, and could produce only an estimate that could not be verified.

Interrogatory No. 3: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1955?
Answer: $447,526.77.

Interrogatory No. 4: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1956?
Answer: $609,125.02.

Interrogatory No. 5: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1957?
Answer: $546,737.85.

Interrogatory No. 6: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business from April 1, 1957 to December 31, 1957?
Answer: $399,657.99.

Interrogatory No. 7: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1955?
Answer: $205,432.44.

Interrogatory No. 8: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1956?
Answer: $323,143.93.

[fol. 180] Interrogatory No. 9: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1957?
Answer: $233,358.46.

Interrogatory No. 10: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the period from April 1, 1957, to December 31, 1957?
Answer: $165,390.98.

Interrogatory No. 11: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1955?
Answer: $94,553.62.

Interrogatory No. 12: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1956?
Answer: $56,616.51.

Interrogatory No. 13: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the fiscal year ending March 31, 1957?
Answer: $26,332.53.

Interrogatory No. 14: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados in California during the period from April 1, 1957 to December 31, 1957?
Answer: $13,906.66.

Fred Piowaty

[fol. 181] *Duly sworn to by Fred Piowaty, jurat omitted in printing.*

[fol. 201] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

JUDGMENT—January 13, 1959

This cause came on for hearing on April 18, 1958, on defendants' motion to dismiss the action because the plain-

tiffs' complaint failed to allege facts showing a cause of action within the jurisdiction of the United States District Court, and the court having heard the argument of counsel, both written and oral, and having considered the depositions, affidavits, and exhibits presented by the parties hereto in connection with the hearing thereof, and the court being fully advised, it is by the Court, this 13th day of January, 1959,

[fol. 202] Ordered that said motion be granted, and that the complaint be and it is hereby dismissed for want of jurisdiction for the reasons set out in the opinion of the Court filed herein on December 17, 1958, and that defendants recover their costs.

Dated: Jan. 13, 1959.

Sherrill Halbert, United States District Judge.

Entered in Civil Docket Jan. 13, 1959.

[fol. 219]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

[Title omitted]

MOTION OF PLAINTIFFS TO AMEND COMPLAINT BY NAMING PRESENT GOVERNOR AND ATTORNEY GENERAL AS DEFENDANTS, IN SUBSTITUTION FOR FORMER GOVERNOR AND ATTORNEY GENERAL—Dated February 2, 1959

The plaintiffs, Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, by their undersigned attorney of record, move the court to grant leave to amend the plaintiffs' complaint: (1) by describing the defendant Edmund G. Brown as governor of the State of California, in lieu of attorney general, and (2) by naming the present attorney general of the State of California, Stanley Mosk, as a party defendant.

As grounds of this motion, plaintiffs represent to the court as follows:

1. Plaintiffs filed their complaint under sections 1331 and 1337 of the Judicial Code and prayed for a hearing of the case by a three-judge court pursuant to sections 2281 [fol. 220] and 2284 of the Judicial Code. Since the action involves the operation of a statute of the state of California, namely, section 792 of the Agricultural Code of California, and since section 2284(2) of the Judicial Code requires that notice of hearing of such an action be given to the governor and attorney general of the state, plaintiffs complied with this requirement by naming as co-defendants Goodwin J. Knight, then governor of California, and Edmund G. Brown, then attorney general of California, together with W. C. Jacobsen, director of the Department of Agriculture of California, and by causing service of summons to be made on said defendants.

2. Thereupon said defendants filed their joint answer to plaintiffs' complaint, also their joint motion for dismissal of the complaint or alternatively for an order staying the action pending resolution of issues of state law by the California courts. Upon hearing and consideration of said motion, the court filed its "Memorandum and Order" on December 17, 1958, and on January 13, 1959 entered its final judgment dismissing plaintiffs' complaint for want of jurisdiction and awarding costs to the defendants.

3. Plaintiffs have directed their attorney of record in this action to prosecute an appeal from said judgment to the Supreme Court of the United States, as provided by section 1253 of the Judicial Code, and in further compliance with section 2284(2) of the Judicial Code desire to give notice of such appeal to the present governor and attorney general of California.

4. On January 5, 1959 the term of office of Goodwin J. Knight as governor of California expired and Edmund G. Brown, having been duly elected as governor, took office as governor and still continues to hold said office. On the same day Stanley Mosk took office as Attorney General of [fol. 221] California, the term of office of Edmund G. Brown

as attorney general having expired and Stanley Mosk having been duly elected to said office, which he still holds.

5. There is substantial need for continuing this action against Edmund G. Brown in his present capacity as governor of California in lieu of his former capacity as attorney general, also substantial need to join as a party defendant the present attorney general, Stanley Mosk, (a) in order to facilitate service of notice on said governor and attorney general of the further proceedings in this action, in compliance with section 2284(2) of the Judicial Code, and (b) because said governor and attorney general, together with the defendant W. C. Jacobsen, who still holds office as Director of Agriculture of the State of California, are the chief officers of the state in charge of enforcement of section 792 of the Agricultural Code of California and are now continuing to enforce said statute, which plaintiffs aver to be in violation of the Constitution of the United States in the respects alleged in plaintiffs' complaint.

6. Since January 5, 1959 the present attorney general, Stanley Mosk, has participated in the proceedings in this case as attorney for the defendants, together with John Fourt, deputy attorney general.

Wherefore plaintiffs pray for leave to amend and supplement their complaint: (1) by changing the designation of the defendant Edmund G. Brown from Attorney General of California to Governor of California; (2) by adding as a party defendant the present Attorney General of California, Stanley Mosk; (3) by striking out the name of Goodwin J. Knight, the former governor, as a party defendant;—all proceedings in the case to stand as if said Edmund G. Brown had originally been designated in the [fol. 222] complaint as governor and as if Stanley Mosk had originally been named as attorney general.

Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., Plaintiffs, By: Isaac E. Ferguson, Attorney for Plaintiffs.

Duly sworn to by Isaac E. Ferguson, jurat omitted in printing.

[fol. 223]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I.

Section 2284(2) of the United States Judicial Code (28 U.S.C.A. 2284 (2)) provides:

"If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State."

No particular form of such notice is specified. Notice to the governor and attorney general of all proceedings in the action is assured by joining them as parties defendant.

II.

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a pleading shall be freely granted when justice so requires.

Subsection (d) of Rule 15 provides:

"*Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

III.

The substitution of parties prayed for in plaintiffs' motion is occasioned by the recent succession of Edmund G. Brown to the office of governor of California and succession of Stanley Mosk to the office of attorney general of [fol. 224] California, and such substitution of parties at any stage of the action is allowable under Rule 15 aforesaid.

United States v. Koike, 9 C.A., 164 F. 2d 155.

Respectfully submitted,

Isaac E. Ferguson, Attorney for Plaintiffs.

[fol. 231] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION
Civil Action No. 7648

[Title omitted]

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT COMPLAINT—
Filed February 9, 1959

Come now the petitioners, Edmund G. Brown, Governor, State of California, and Stanley Mosk, Attorney General, State of California, and appear in the above-entitled action, *specially only*, and for the sole purpose of opposing plaintiff's motion for leave to amend and supplement their complaint (1) by describing the defendant Edmund G. Brown as Governor instead of as Attorney General, State of California, and (2) by naming Stanley Mosk, Attorney General, State of California, as a party defendant, in substitution of [fol. 232] Edmund G. Brown, former Attorney General, State of California. Plaintiff's motion leaves unchanged the allegations in the body of the complaint. Petitioners oppose and object to plaintiffs' said motion on the following grounds:

It is fundamental that a suit in the federal courts to enjoin a public officer from enforcing a statute is personal, and, in the absence of statutory provision for continuing it against his successor in office, the action abates upon his death or retirement from office (*Pullman Co.* v. *Croom*, 231 U.S. 571, 576; *United States* v. *Boutwell*, 17 Wall 604). A successor in public office is not privy to his predecessor in respect of the alleged wrongful conduct (*Pennoyer* v. *McConnaughy*, 140 U.S. 1, 10; *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600, 603-604; *Philadelphia Company* v. *Stimson*, 223 U.S. 605, 620-621; *Irwin* v. *Wright*, 258 U.S. 219, 222). These principles are necessarily applicable to suits against state officers, because suits against such persons in their capacity as state officers constitute

suits against a state in contravention of the Eleventh Amendment (*Ex parte Ayers*, 123 U.S. 443; *Minnesota* v. *Hitchcock*, 185 U.S. 373; *Fitts* v. *McGhee*, 172 U.S. 516; *In re State of New York*, 256 U.S. 490).

Plaintiffs' suit to enjoin enforcement of California Agricultural Code sections 784 and 792 was ordered dismissed by this court on December 17, 1958, for the reason that no case or controversy existed under Article 3 of the United States Constitution. Subsequently, on January 5, 1959, the terms of office of former Governor Goodwin J. Knight and of former Attorney General Edmund G. Brown expired. On the same date, petitioner Edmund G. Brown became Governor, and petitioner Stanley Mosk became Attorney Gen- [fol. 233] eral of the State of California.

Plaintiffs' motion comes within Rule 25(d), Federal Rules of Civil Procedure (28 U.S.C.). This rule, which is not cited by plaintiffs, provides:

> *"Substitution of Parties*
>
> • • •
>
> "(d) *Public Officers; Death or Separation from Office.* When an officer of . . . a state . . . is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

As grounds for the substitution, plaintiffs' application merely states they desire to appeal the order of dismissal, that the substitution will "facilitate service of notice" on the incumbent state Governor and Attorney General, and that

said incumbent state officers "are now continuing to enforce said statute" (Plfs. motion, p. 3).

It is apparent that notices and legal process can be [fol. 234] served upon petitioners without their being joined as party defendants, and plaintiffs' first ground for substitution is clearly untenable. Plaintiffs allege as a second ground that petitioners are continuing to enforce these state laws. This statement sets forth only the legal conclusion of the pleader and does not state facts showing the commission of personal trespasses or wrongs which would justify the application of the extraordinary remedy of injunction (*Fitts* v. *McGhee, supra,* 172 U.S. 516, 528; *Watson* v. *Buck,* 313 U.S. 387, 400). The plaintiffs' motion makes no allegation of fact from which it can be concluded that either the petitioner Governor Brown or Attorney General Mosk have threatened specific legal action of any kind against the plaintiffs. Plaintiffs' right to perfect its appeal remains intact since W. C. Jacobsen, State Director of Agriculture, remains a party defendant.

As contrasted to the defendant Jacobsen, neither the petitioner Governor Brown, nor petitioner Attorney General Mosk, are specifically charged with the execution of sections 784 and 792, California Agricultural Code. For example, the direct enforcement of these statutes is vested in the Director of Agriculture and the Agricultural Commissioner of each county (Agr. Code, sec. 782), and actions to abate loads of fruits and vegetables as nuisances are filed by District Attorneys of the various counties in the name of the People of the State of California (Agr. Code, sec. 785). These facts make applicable *Fitts* v. *McGhee, supra,* 172 U.S. 516, 529, where the court held:

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act [fol. 235] a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special

> relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In actual fact it would be impossible for either petitioner to have threatened action of any kind against the plaintiffs since January 5, 1959, because there have been no commercial shipments of Florida avocados received in California [fol. 236] during the last eleven months and consequently no opportunity for the application of California law during this time to the plaintiffs' avocados (Affidavit of S. R. Whipple, attached hereto as Exhibit A).

Plaintiffs' motion is ill taken under *Ex Parte La Prade*, 289 U.S. 444, a case in which several railroads filed suit in a federal district court against one Peterson, then Attorney General of the State of Arizona, to restrain enforcement by him of an Arizona train length statute. After hearing, but before judgment, Peterson's term of office expired, and one La Prade became Attorney General. The United States Supreme Court affirmed the refusal by the district court to substitute petitioner La Prade for defendant Peterson as a party, saying:

> "As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant

acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. United States Constitution, Art. VI, cl. 3. Arizona Revised Code, 1928, sec. 63. . . .

"It follows from what has been said that § 780 (for-[fol. 237] mer sec. 28, U.S.C. 780, now Rule 25(d), Federal Rules of Civil Procedure) has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved" (289 U.S. at 458-459).

Also in point is *Ex Parte Poresky*, 290 U.S. 30, where the Supreme Court approved dismissals by the federal district court as to the Governor and Attorney General of Massachusetts, upon the ground they were improperly joined as parties, where plaintiffs' real grievance was against the defendant Massachusetts Registrar of Motor Vehicles, who had refused to issue plaintiff registration and number plates under a Massachusetts compulsory automobile liability insurance statute.

Petitioners submit that plaintiffs can obtain all the relief to which they are entitled, including their right of appeal, against the defendant W. C. Jacobsen, the State Director of Agriculture. Plaintiffs have made no showing either in their complaint, or in this motion, that petitioners Edmund G. Brown and Stanley Mosk have threatened to enforce

these statutes against plaintiffs. Neither have the plaintiffs shown that there is a substantial need for continuing this action against these moving petitioners are (sic) required by Rule 25(d), Federal Rules of Civil Procedure.

[fol. 238] Wherefore, petitioners pray that plaintiffs' motion be denied.

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 239]

EXHIBIT "A" TO SPECIAL APPEARANCE

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil Action No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, defendants.

AFFIDAVIT OF S. R. WHIPPLE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Comes now S. R. WHIPPLE and deposes and says:

That he is Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agricul-

ture; that he has held said position since August, 1945; that in such position he is charged with the duty of supervising the inspection work performed by inspectors of the Bureau of Fruit and Vegetable Standardization and the [fol. 240] California County Agricultural Commissioners and their staffs in the inspection of avocados found in California wholesale terminal markets in the enforcement of section 792 of the California Agricultural Code, which requires that avocados offered for sale, among other things, also must meet a minimum oil content requirement of eight per cent (8%). That in such capacity he has access to and is familiar with the records pertaining to avocados marketed in California maintained by the Director of Agriculture and more particularly maintained by the California Department of Agriculture Bureaus of Fruit and Vegetable Standardization, Market News, and Agricultural Statistics.

That the official records maintained by the California Department of Agriculture Bureaus of Fruit and Vegetable Standardization, Market News, and Agricultural Statistics, show that no commercial shipments of avocados grown in Florida arrived in California for purposes of sale or otherwise during the period of time March 1, 1958, to February 5, 1959; that affiant has confirmed the reliability of these records by the receipt of reports from the County Agricultural Commissioners of the Counties of Los Angeles, Alameda and San Francisco, the principal receiving areas in California for avocados grown in Florida; that the records in the offices of said County Agricultural Commissioners disclose that no Florida avocados were inspected nor offered for inspection in their respective counties during the period of time March 1, 1958, to February 5, 1959.

S. R. Whipple

Subscribed and sworn to
before me this 5th day
of February, 1959.

Laura M. Middleton
Notary Public in and for the
County of Sacramento,
State of California.

[fol. 241] Affidavit of service by mail (omitted in printing).

[fol. 242]

[Title endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil Action No. 7648

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 12, 1959

I.

Notice is hereby given that Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., the above named plaintiffs, hereby appeal to the Supreme Court of the United States from the final judgment dismissing plaintiff's complaint for want of jurisdiction, entered in this action on January 13, 1959.

This appeal is taken pursuant to 28 U.S.C.A. section 1253.

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 243] Court of the United States, and include in said transcript the following:

1. Complaint filed November 13, 1957.

2. Summons and return filed November 22, 1957.

3. Answer of defendants filed December 6, 1957.

4. Answer of defendants filed December 6, 1957. (Omit affidavit of service.)

5. Request of plaintiffs to set case for trial at early convenience of court, filed February 24, 1958. (Omit notice of motion and certificate of service.)

6. Interrogatories propounded by plaintiffs to defendant W. C. Jacobsen, filed February 24, 1958.

7. Answers of W. C. Jacobsen to interrogatories, filed March 6, 1958.

8. Answers of Harold E. Kendall to defendants' interrogatories, filed April 8, 1958.

9. Answers of Fred Piowaty to defendants' interrogatories, filed April 8, 1958.

10. Amended answer of defendants to plaintiffs' complaint, filed March 20, 1958.

11. Depositions of R. M. Wimbish, David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty, together with exhibits, filed March 14, 1958.

12. Notice of motion by defendants, directed to Florida Lime and Avocado Growers, Inc., for an order dismissing the action, or alternatively for stay of proceedings, filed March 14, 1958. (Omit affidavit of service.)

13. Notice of motion by defendants, directed to South Florida Growers Association, Inc., for an order dismissing the action, or alternatively for stay of proceedings, filed March 14, 1958. (Omit all portions after page 2, as identical with all pages of Item 12 following page 2.)

[fol. 244] 14. Plaintiffs' memorandum in opposition to defendants' motion to dismiss action, filed March 31, 1958.

15. Defendants' closing points and authorities in support of motion to dismiss action, filed April 9, 1958. (Omit affidavit of service.)

16. Docket entry April 18, 1958, *re* hearing on that date.

17. Memorandum and order of court filed December 17, 1958.

18. Proposed judgment order lodged by defendants December 24, 1958. (Omit affidavit of service.)

19. Final judgment filed and entered January 13, 1959.

20. Notice by clerk of entry of judgment, mailed January 13, 1959.

21. Notice of entry of judgment mailed by defendants' attorneys to plaintiffs' attorney January 14, 1959.

22. Notice of appeal to Supreme Court of United States.

III.

The question presented by the appeal and the circumstances under which it arises

Did the three-judge district court properly dismiss the action, without a trial, for alleged lack of a present controversy cognizable by the court within its constitutional jurisdiction?

To indicate the circumstances of the case infolded in the question presented by the appeal, an outline is submitted of the state of the record at the time of the court's decision.

Complaint: The action was instituted under 28 U.S.C.A. 1331 and 1337 by two large-scale handlers of Florida avocados, who since June 11, 1954 have been engaged in interstate commerce in avocados grown in South Florida under a marketing agreement then made by the Secretary of Agriculture of the United States, acting pursuant to the authority vested in him by the Marketing Agreement Act of 1937 (7 U.S.C.A. 601 *et seq.*), and the growers and handlers of [fol. 245] such avocados. The relief sought is declaratory judgment and injunction to restrain further enforcement against appellants of the statute of California (Agricultural Code 792) prohibiting sale in that state of avocados containing less than 8% oil, at the civil and criminal penalties prescribed in other sections of the Agricultural Code (784, 785, 785.6, 786, 831).

In essence, the complaint is that the varieties of avocados grown in Florida, due to the origin of these varieties and the climatic conditions under which they are grown, are of low oil content and seldom attain 8% of oil at maturity, in contrast with the avocados of high oil content produced in California; that a requirement of 8% oil content, when applied to the avocados grown in Florida, is not a valid standard of maturity or quality and serves only to maintain an arbitrary embargo against the marketing of Florida avocados in California; that the avocados shipped by appel-

lants in interstate commerce, notwithstanding low oil content, are mature, wholesome and in compliance with the standards of maturity and quality established by the Secretary of Agriculture pursuant to the authority vested in him by the Marketing Agreement Act of 1937 and the South Florida avocado marketing agreement, but that appellants have nevertheless been and continue to be frustrated in their attempts to avail themselves of the California market for their fruit by the barrier of the 8% oil content requirement;* that continued enforcement against appellants of section 792 of the Agricultural Code of California is in contravention of the commerce clause of the United States Constitution (article I, section 8, sub-clause 3) and the equal protection provision of section 1 of the Fourteenth Amendment.

[fol. 246] *Answer*: Appellees filed a joint answer to the complaint, replaced by an amended answer, pleading six defenses: (1) general demurrer; (2) lack of jurisdiction; (3) seriatim reply to each of the paragraphs of the complaint, admitting or denying the allegations of the various paragraphs; (4) that appellants should be required to set up the invalidity of the challenged statute in the state court; (5) that the quality and maturity standards promulgated under the marketing agreement governing avocados grown in South Florida, and the methods and procedures used in the administration thereof, are invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937; (6) that sections 784 and 792 of the California Agricultural Code constitute a legitimate exercise of the state police power.

Motion to dismiss: Following the filing of depositions taken in Miami, Florida, appellees filed identical motions directed to each of the appellants to dismiss the action for failure of the complaint to allege facts showing a cause of action within the equity jurisdiction of the court, lack of jurisdiction under 28 U.S.C.A. 1331 or 1337, and failure of

* Particular attention is directed to the allegations of the complaint regarding appellants' attempts to market their avocados in California (paragraphs XXIV(b), XXV, XXVI, XXVII).

the complaint to state a claim against the appellees upon which relief can be granted. Appellees moved the court, in the alternative, to hold the case in abeyance pending an authoritative interpretation of the challenged California statutes and regulations by the California courts.* The motion was said to be based on the pleadings, affidavits filed with the motion and the depositions and answers to interrogatories then on file.

Hearing and ruling: Appellees motions to dismiss the action were heard and submitted April 18, 1958. On [fol. 247] December 17, 1958, a "Memomandum and Order" of the court was filed, holding that there is no claim here of a present existing controversy between the parties; that an actual controversy could arise only if there was a coexistence of four facts, (1) the bringing of avocados to California by appellants, (2) failure of the avocados to meet the standards fixed by law, (3) refusal of appellants to recondition or remove the avocados, and (4) an election by appellants to contest the abatement in the state courts as provided by section 785 of the Agricultural Code of California.

Effect of ruling: The court's formula for "a present existing controversy" ignores the continuous effect of the 8% oil requirement to bar most Florida avocados from California, by far the most favorable market for this fruit in the United States. Also, the effect of the formula is to preclude forever a trial of appellants' complaint in the federal court.

Section 785 of the California Agricultural Code provides for court procedure to review a determination by an enforcing officer that a certain lot of fruit is not in compliance with the applicable standardization provisions of the Code, also to consider the manner of disposing of the noncomplying fruit. In the case of perishable fruit, such as avocados, upon the filing of a petition by the enforcing officer to abate the nuisance, the court may forthwith order that the fruit

* No question is raised in the complaint regarding the method for testing oil content of avocados prescribed by the Director of Agriculture of California, or of the accuracy of the test in any instance.

be destroyed or the nuisance otherwise abated. It is not apparent how the issues raised in appellants' complaint under the Constitution of the United States could be presented in a proceeding under section 785 of the California Agricultural Code. Even so, the question on this appeal is intended to include the question whether the appellants may thus be barred from trial of their complaint by the federal court.

Isaac E. Ferguson, Attorney, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc.

[fol. 248] PROOF OF SERVICE (omitted in printing).

[fol. 253]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civ. No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATIONS, INC., a Florida corporation, Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND THEIR COMPLAINT THROUGH SUBSTITUTION OF PARTIES—February 20, 1959

Plaintiffs have heretofore instituted suit against certain officials of the State of California by which an injunction

was sought against the enforcement of allegedly unconstitutional portions of the California Agricultural Code. That suit was ordered dismissed for lack of jurisdiction. Subsequently the term of office of the then Governor and Attorney General, joined as defendants in the complaint, [fol. 254] expired, and Edmund G. Brown and Stanley Mosk, respectively, have succeeded to those positions.

Before noticing their appeal, which has since been perfected, plaintiffs moved to amend and supplement their complaint insofar as its caption was concerned, by substituting these new holders of the office of Governor and Attorney General of the State of California respectively, as parties defendant (Federal Rules of Civil Procedure, Rule 25(d)). Both Brown and Mosk have appeared specially in opposition to this motion.

At argument it appeared that the original officers had been joined out of a commendable abundance of caution, it not being clear whether they were entitled merely to notice, or whether they were made proper parties to the action by statute (Title 28 U.S.C.A. §2284(2)). It further appeared that the motion was being resisted principally on the ground that any action taken by this Court might be construed as inconsistent with the judgment of dismissal, heretofore rendered, and so might breathe new life into the matter.

There is no need to reach the problem of whether this Court has the power to modify the pleadings of an action dismissed for want of jurisdiction as substitution under Rule 25(d) is restricted in its application to substitution of proper parties (*Schwartz* v. *Metropolitan Life Ins. Co.*, 2 F.R.D. 167). In their motion plaintiffs have failed to show either that the Governor and the Attorney General are proper parties, or that there is a substantial need for the substitution of the names of the new holders of those [fol. 255] State offices (Federal Rules of Civil Procedure, Rule 25(d), and *Danenberg* v. *Cohen*, 213 F. 2d 944).

As the power to find this Court in error, and allow the substitution sought in the instant motion, subsists at the appellate level, it does not appear that the denial of plaintiffs' motion will in any way prejudice or reduce plaintiffs' rights.

It Is, Therefore, Ordered that plaintiffs' motion to amend their complaint, through substitution of new office holders, be, and the same is, hereby denied.

Dated: February 20, 1959.

Sherrill Halbert, United States District Judge.

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil Action No. 7648

FLORIDA LIME and AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

v.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, Defendants.

Depositions—Filed March 14, 1958

Depositions of David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall, and Fred Piowaty, witnesses on behalf of the plaintiffs, taken before Henry E. Colman, a Notary Public in and for the State of Florida at Large, in Parlor A, McAllister Hotel, Biscayne and Flagler Streets, Miami, Florida, on January 21 and 22, 1958, pursuant to the stipulation of counsel hereto annexed.

APPEARANCES:

Mr. Isaac Edward Ferguson, 233 South Beverly Drive, Beverly Hills, California, on behalf of plaintiffs.

[fol. 2] Mr. John E. Fourt, Deputy Attorney General of the State of California, Library-Courts Building, Sacramento, California, on behalf of defendants.

Mr. William A. Norris, of the firm of Tuttle, Tuttle and Taylor, 711 Equitable Life Building, 411 West Fifth Street, Los Angeles, California, on behalf of Calavo Growers of California.

* * * * *

COLLOQUY AMONG COUNSEL

Mr. Ferguson: The depositions to be taken here today and tomorrow are being taken pursuant to stipulation of counsel, a copy of which has been given the Notary Public, and it is requested that the stipulation be annexed to the depositions when completed.

Mr. Norris: My name is William A. Norris, of the Los Angeles law firm of Tuttle, Tuttle and Taylor, general counsel for Calavo Growers of California. Calavo Growers of California proposes to file in the near future a motion to intervene in this action as a party. I am here as counsel for Calavo Growers of California to protect their interests during the course of these depositions.

Mr. Ferguson: On behalf of the plaintiffs, I welcome the presence of Mr. Norris, and have no objection to his participation in the taking of these depositions. Of course there is nothing to say at this time about the proposed request of Calavo Growers of California to be permitted to intervene as a party in this case, but if Mr. Norris [fol. 3] wants me to say something about it at this time, I will be glad to do so.

Mr. Norris: I think in fairness to you, Mr. Ferguson, that my participation here at this time should be without prejudice to any position you may want to take with respect to intervention later on.

Mr. Ferguson: My thought now is that there will be no objection on the part of the plaintiffs to an intervention if the Court deems it proper, however, our position will be that it must not in any way delay the hearing of this case or complicate the issues thereof.

Mr. Fourt: On behalf of the defendants, Jacobsen, Knight and Brown, we agree to the participation in the

taking of these depositions by Calavo Growers of California, and agree to the presence here and to the participation in the depositions of Calavo's attorney, Mr. William A. Norris.

Mr. Ferguson: I request that the Notary Public attach to Mr. Biggar's deposition, when completed, the subpoena pursuant to which Mr. Biggar appears here this morning.

DEPOSITION OF DAVID M. BIGGAR

DAVID M. BIGGAR a witness on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Please state your name.

[fol. 4a] A. David M. Biggar.

Q. Will you tell us where you live, Mr. Biggar?

A. I live in Homestead, Florida.

Q. What is your occupation?

A. Manager of Avocado Administrative Committee, an organization established by the Secretary of Agriculture of the United States to administer the provisions of Marketing Order 969, regulating the handling of avocados grown in South Florida.

Q. Is that Marketing Agreement number 121?

A. That is the agreement number, yes.

Q. And the order, in shortened form, is 69?

A. 969, or, in the shortened form, 69.

Q. Where is your office?

A. 1102 North Krome Avenue, Homestead, Florida.

Q. Since when have you been manager of the Avocado Administrative Committee of South Florida?

A. Since July, 1954; since the inception of the Marketing Agreement and Order.

Q. What are your duties as manager of Avocado Administrative Committee?

A. My duties are administrative, arranging for meetings and conducting the usual office functions of an office manager, as well as carrying out other administrative duties.

Q. Do you keep all of the Committee's records?

A. Yes, I keep the records of the Committee.

[fol. 5] Q. Does that include the preparation of statistical data deemed of interest to the growers and handlers of avocados who operate under the Federal Marketing Agreement?

A. In the course of my duties and functions, I prepare statistical releases for the industry and am required at the end of each year to issue a report to the Secretary and to all interested growers concerning the activities of the Committee for the current season.

Q. So that you have issued by this time many annual reports?

A. We have issued three annual reports as of this time; one for each season, 1954-55, 1955-56 and 1956-57. Our current fiscal year ends March 31st, and we will issue the fourth report subsequent to that date.

Q. Does that define the season; in other words, do you mean by "season", your fiscal year?

A. It so happens that our fiscal year coincides with our season.

Q. It extends from April 1 of one year to March of the following year?

A. Our fiscal year extends from April 1 through March 31st. Our actual shipping season starts somewhat later and terminates as a rule somewhat later.

Q. Before you became associated with the Avocado Administrative Committee in 1954, had you been a student to some extent in the field of agriculture?

A. Quite.

[fol. 6] Q. Go ahead and tell us about that.

A. I received my Master of Agriculture Degree at the University of Florida in June, 1954. I specialized in the field of agricultural marketing for the purpose of that degree, and took my Bachelor's Degree in Business Administration, with a major in the field of marketing also.

Q. Is it one of your duties as Committee manager to issue licenses to handlers of avocados who meet the requirements of the Marketing Agreement?

A. It is.

Q. I show you two documents entitled "Registered Avocado Handler", to be marked plaintiffs' exhibits 1 and

2 for identification, and ask you if these are the documents which you prepared and issued?

Mr. Fourt: May I see them?
Mr. Ferguson: Yes. Let me have them marked first.
The Witness: They are.

By Mr. Ferguson:

Q. What are they?
A. They are certificates of registration showing that the handlers, Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., have registered with the Avocado Administrative Committee pursuant to the requirements of the Marketing Agreement and Order having to do with the handling of avocados grown in South Florida.
Q. For what period are these registrations effective?
[fol. 7] A. These registrations are effective for the 1957-58 season, or from April 1, 1957 through March 31, 1958.
Q. Were identical licenses issued to the same handlers in prior years?
A. Identical registrations. Of course the form itself varied with the season, but most of these organizations were licensed or registered—I prefer to use the word registered—for each of the seasons covered by the Federal Marketing Agreement and Order.
Q. That would be since June, 1954?
A. Correct.

Mr. Ferguson: Plaintiffs' exhibits 1 and 2 are offered in evidence, and I would like to have an understanding as to these documents or any other original documents that may be offered in evidence, that photostats may be substituted for the originals.
Mr. Fourt: The defendants, Knight, Jacobsen and Brown, have no objection to the substitution of photostats. However, Mr. Ferguson, we believe it is premature to offer them in evidence at this time. Wouldn't it be better to just have them marked for identification?
Mr. Ferguson: They are now marked for identification. The offer is made to indicate that the interrogation will be followed by an offer of the documents in evidence.

Mr. Fourt: However, we are not stipulating that they may be admitted in evidence.

[fol. 8] Mr. Ferguson: No. I am not asking you to stipulate to their admission. We will leave that for a ruling of the Court. With that clarification, Mr. Fourt, I am asking only that there be an agreement that the photostats may be offered in lieu of the originals.

Mr. Fourt: It is so stipulated.

Mr. Norris: It is so stipulated by Calavo Growers of California, so long as it is understood that there is no agreement that they are to be admitted in evidence.

Mr. Fourt: Perhaps we can reduce the confusion here if Jacobsen, Brown and Knight are referred to as defendants, and Calavo be referred to as intervener.

Mr. Norris: I will just refer to my client as Calavo Growers of California, as distinguished from any parties.

By Mr. Ferguson:

Q. Mr. Biggar, since 1954 has all of your time been devoted to the problems of the Avocado Industry in Florida in relation to the functioning of the Avocado Administrative Committee?

A. No. I am jointly employed by two Committees, the Avocado Administrative Committee, who were my sole employers for 1954-1955 season. Since 1955-56, I have been employed jointly by the Lime Administrative Committee, a parallel organization to the Avocado Administrative Committee.

Q. What area is embraced in the Federal Marketing Agreement, number 121, or Marketing Order number 69 [fol. 9] of the United States Secretary of Agriculture?

A. Marketing Order 969, and the accompanying Marketing Agreement, as amended, now encompasses the counties of Pinellas, Hillsborough, Polk, Lake, Orange and Brevard, and all counties situated south of a line created by the boundaries of these counties and located south of these counties in the State of Florida.

Q. Does this include the entire area of Florida in which avocados are customarily grown?

A. Yes.

Q. Is there considerable backyard or non-commercial and commercial growing of avocados in Florida?

A. There is considerable commercial and non-commercial growing of avocados in South Florida, yes.

Q. Approximately what is the acreage of commercial production of avocados in Florida?

A. I have been told that the acreage is approximately eleven thousand acres. I have never had cause to question the figure or to check the figure, personally.

Q. Is this in the main a central production area?

A. The bulk of the production, and we estimate this to be approximately ninety percent; in other words, we estimate that the production in Dade County, Florida is ninety percent of the total production.

Mr. Norris: It is understood, is it not, that all ob-
[fol. 10] jections as to the admissibility of any of this testimony are reserved for trial, and if we can object on the ground of hearsay at that time we will not necessarily make objections at this time.

By Mr. Ferguson:

Q. Mr. Biggar, you have already mentioned the annual reports of the Avocado Administrative Committee which you have prepared. Is there included in the first annual report for the 1954-55 season a summary of the regulations made by the Secretary of Agriculture, fixing the permissible shipping dates for the various varieties of avocados handled in South Florida?

A. With your permission, Mr. Ferguson, I will refresh my memory on that.

Q. Just go ahead and look at it. Do you have copies?

A. Yes, I have copies of each of these. There is comment on the regulations, but not in a summary form, however, in this particular publication for 1954-1955 season.

Q. Not a schedule of dates?

A. No, sir.

Q. Does the Avocado Administrative Committee receive a copy of each order made by the Secretary of Agriculture under the Marketing Agreement?

A. It does.

Q. Do you have with you at this hearing a complete file of these orders?

A. I do.

[fol. 11] Q. Turning now to the 1955-56 annual report, does this include a reproduction of the schedule of permissible shipping dates for avocados in the 1955-56 season?

A. This schedule makes reference to Avocado Orders numbers 6, 8, 10 and 11, but does not reproduce those orders.

Q. It contains no summarized schedule of shipping dates?

A. It does not.

Q. I direct your attention to pages 16 and 17 of this report entitled "SUMMARY OF AVOCADO SHIPMENTS BY VARIETIES AND BY WEEKS—1955-56 SEASON". Did you prepare this summary?

A. I did.

Q. From what source of information?

A. This information was compiled from copies of the Federal-State Inspection Certificates issued by the United States Department of Agriculture in cooperation with the Florida State Department of Agriculture.

Q. Does the Avocado Administrative Committee receive copies of all inspection certificates?

A. We do.

Q. Issued by the Inspection Service?

A. Yes. May I qualify that?

Q. Yes.

A. I mean pertaining to avocados.

Q. I meant, of course, Mr. Biggars, pertaining to avocados.

A. That is right.

[fol. 12] Mr. Ferguson: Will the reporter mark this document as plaintiffs' exhibit 3 for identification?

By Mr. Ferguson:

Q. Mr. Biggar, I now show you a document marked plaintiffs' exhibit 3 for identification. Is this the type of inspection certificate to which you referred in your last answer?

A. It is.

Q. Does the Committee receive duplicate copies of all such certificates issued by the Federal-State Inspection Service of Florida?

A. Yes, affecting avocados.

Q. This particular certificate is not your file copy, is it?

A. The copy that we received is at present and it has been in the past a green copy of a multiple system.

Q. What color is this one?

A. This one is yellow.

Q. Issued to whom?

A. I am not clear on this. It is one of the copies that we do not receive.

Q. Incidentally, Mr. Biggar, in this certificate, under REMARKS, appear some abbreviations. Will you be good enough to explain those to us?

A. Under REMARKS on this particular certificate, being certificate number B-66158, is the following: "Meets [fol. 13] Florida AAC No. 2 Grade MSO". The term "AAC No. 2 Grade", refers to the Avocado Administrative Committee number 2 grade, as approved by the Secretary of Agriculture. With your permission I will look in my notes here and give you the docket number on that. The "AAC No. 2 Grade" refers to Avocado Administrative Committee Rules and Regulations, Grade Standards, as amended, as reprinted from the Federal Register of April 13, 1956.

Q. I was going to ask you about that at a later point. That explains that.

A. This "AAC No. 2 Grade" contained within that is a grade designation of this document that I referred to.

Q. You mean the number 2 grade stated in the certificate?

A. The number 2 grade under REMARKS—I will read it, "Meets Florida AAC No. 2 Grade"—that is a grade designation within the document referred to before. The "MSO" is a short abbrevation for the terminology "Meets Secretary's Order". That is a terminology used on all certificates to indicate that the fruit described in the certificate has met the provisions of the Federal Marketing Order by the Secretary of Agriculture.

Q. Now, Mr. Biggar, coming back to pages 16 and 17 of the 1955-56 annual report, is this summary of avocado

shipments by varieties and weeks, comprising pages 16 and 17 of the Committee's annual report, true and correct?

A. Substantially so, yes.

Q. Now, instead of using the book, Mr. Biggar, I will ask [fol. 14] you if you have other mimeograph—

Mr. Fourt: We have no objection to the book being used.

Mr. Ferguson: I don't want to further encumber the record. If there is anything in the report you want, in addition to these two pages, a prior agreement to admission, all right; however, at the moment I will ask that these two pages be marked plaintiffs' exhibit 4 for identification.

Mr. Fourt: That is agreeable.

Mr. Ferguson: Plaintiffs' exhibit 4 will be offered in evidence. It is marked for identification only now, and that is all I can do at this time, until the Court rules.

Mr. Fourt: Since I want to be very careful about this record, I desire that it be understood that we are not stipulating to it being admitted in evidence.

Mr. Ferguson: No, but it might guide your cross examination of the witness.

By Mr. Ferguson:

Q. Turning now to page 19 of this 1955-56 annual report, entitled "COMPOSITE SUPPLY OF AVOCADOS, 1955-56 Season, By Points of Origin",—did you prepare this tabulation?

A. Yes.

Q. From what source?

A. As footnoted on this page, in the case of California, this was from "Estimated from monthly production data" supplied by Calavo Growers of California at my request. Under suggestions made by Calavo Growers of California [fol. 15] concerning distribution, and in some instances—I don't recall the exact period, from estimates made by Calavo Growers of California on periods not yet completed when they supplied the material.

On the Florida information, that was taken or compiled from certificates of inspection received from the Federal Inspection Service.

The Cuban information, as footnoted, was from unpublished records of United States Department of Agriculture Inspection Service, which we received in letter form from the Agriculture Marketing Service in Washington, and they in turn compiled the information from inspection certificates issued covering shipments from Cuba to the United States mainland.

Q. As to Florida, does the Committee receive reports from the handlers of avocados under the Marketing Agreement, as to the quantity handled, from time to time?

A. Mr. Ferguson, I call your attention again to the fact that this is a 1955-56 annual report. At that time we didn't receive such reports. The information contained on the certificate at that time indicated varieties, and the entire information was taken from the certificates at that time. Now subsequent to that "Variety" has been omitted from the certificate, and we receive a certificate now showing total quantities, and a report from handlers showing varieties and total quantities.

Q. How regularly are these reports received?

A. These reports are received weekly, but this particular [fol. 16] annual report which we are discussing at this moment, Mr. Ferguson, does not include any weekly reports from handlers. It is compiled in its entirety from certificates of inspection.

Q. Now, Mr. Biggar, with that explanation of the material used, is this tabulation a true and correct summary of the data?

A. For Florida?

Q. No; in its entirety.

A. It is and, as I explained earlier, the source.

Q. And you refer now to the tabulation in its entirety?

A. Yes.

Mr. Ferguson: I will now ask to have this mimeograph copy of page 19 marked for identification as plaintiffs' exhibit 5.

Mr. Fourt: For identification.

Mr. Ferguson: Yes. Plaintiffs' exhibit 5 will be offered in evidence, and I call counsel's attention to the fact that the results of this tabulation are alleged in the Complaint

and admitted in the Answer, namely, in paragraph 15 of the Complaint, and page 2, lines 20 to 26 of the Answer.

Mr. Fourt: The defendants are not stipulating that this is to be admitted in evidence, Mr. Ferguson.

Mr. Ferguson: That is right. This holds all the way through, Mr. Fourt, so I won't burden you to repeat it each time.

Mr. Fourt: Thank you.

By Mr. Ferguson:

Q. Mr. Biggar, I now call your attention to the Com- [fol. 17] mittee report for the 1956-57 season, particularly to pages 7 and 8 thereof, entitled "MATURITY REGULATIONS". Did you prepare this summary?

A. I did.

Q. Is this a true and correct summary of the orders made by the Secretary of Agriculture with respect to the Maturity Regulations having to do with the shipping of avocados under the Marketing Agreement in the 1956-57 season?

A. It is.

Mr. Ferguson: Will the reporter please mark another copy of these two pages, 7 and 8, as plaintiffs' exhibit 6 for identification?

(Said pages 7 and 8 marked plaintiffs' exhibit 6 for identification.)

Mr. Ferguson: Plaintiffs' exhibit 6 for identification will be offered in evidence.

By Mr. Ferguson:

Q. Mr. Biggar, pages 18 and 19 of this report appear to be a summary of avocados handled by varieties and by weeks in the 1956-57 season. Did you prepare this summary?

A. I did.

Q. From the records of the Avocado Administrative Committee?

A. On page 19 it is footnoted that "Lines 1-13 show net quantities shipped, based on 3 flats equal 1 multilayer, 4 flats equal one bushel.

"Lines 14-40 show approximate gross quantities handled [fol. 18] (including gradeout) as reported weekly by handlers."

Lines 1 to 13 were taken directly from the certificate which at that time showed varieties.

Q. These are the inspection certificates?

A. That is correct, the Federal-State Inspection Certificates, as previously entered as an exhibit here.

As stated, lines 14 through 40 were taken from the handlers' weekly reports as footnoted, showing approximate gross quantities handled by varieties.

At the period ending September 15, 1956, the policy of the Federal-State Inspection Service was to change so as to no longer require that the variety be shown on the actual inspection certificate. The variety is taken into cognizance by the inspector and noted on his worksheet, and the term "MSO" or "Meets Secretary's Order" is placed at the bottom of the certificate to indicate that this variety has been taken into cognizance, but it is no longer shown on the face of the certificate of inspection.

Q. With the explanation you have just made, Mr. Biggar, is this summary a true and correct compilation from the figures shown in the Committee's records?

A. Yes.

Mr. Ferguson: Will the reporter mark this document, consisting of two pages, as plaintiffs' exhibit 7 for identification?

By Mr. Ferguson:

Q. At page 21 of this 1956-57 report, there is a tabula- [fol. 19] tion entitled "Composite Supply of Avocados by Season and Points of Origin". Is that of the same nature as a like summary in the prior annual report?

A. It is. I might call your attention to the footnotes—

Q. I was going to ask you the source of the information. The footnote there reads "1955-56 Florida quantities revised to reflect standard base of 4 flats equal one bushel; one multilayer equals 3 flats."

A. By way of explanation, in the earlier report submitted here in evidence, Mr. Ferguson, the bushels were

computed on the basis of weight, a weight of fifteen pounds per flat and forty pounds per multilayer; that was the standard unit of measure there computed. This unit of measure was changed during the 1956-57 season, and the bushel, for the purpose of our record keeping, was computed on a volume basis, with each flat assigned a value of one-quarter bushel, and each multilayer a total value of three-fourths of a bushel, for accounting purposes. Now, to bring the figures into proper perspective, the 1955-56 figures as pertain to Florida were revised and recomputed, and there will be discrepancy between the figures shown in the 1955-56 portion of page 21 of the 1956-57 annual report, with those shown for the 1955-56 report.

Q. Due to mathematical adjustments?

A. Yes, due to mathematical adjustments.

Q. Referring to the 1956-57 summary contained on this [fol. 20] page, is that true and correct?

A. It is true and correct, taking into consideration the source of information in each instance.

Q. And as to that, Mr. Biggar, do you wish to add to your footnotes appearing on the page itself?

A. No; I believe that will stand.

Mr. Ferguson: Will the reporter please mark this document as plaintiffs' exhibit 8 for identification?

(Document so marked by reporter.)

Mr. Ferguson: The document now marked plaintiffs' exhibit 8 for identification will be offered in evidence as plaintiffs' exhibit 8.

By Mr. Ferguson:

Q. Mr. Biggar, I now show you a document entitled "Avocado Shipping Dates, 1957-58 Season," which I will ask the reporter to mark as plaintiffs' exhibit 9 for identification. Did you prepare this document?

A. I did.

Q. Is this a true summary of orders made by the Secretary of Agriculture respecting the shipping dates for Florida avocados in the 1957-58 season?

A. It is.

Mr. Ferguson: I advise counsel that I shall offer this page as plaintiffs' exhibit 9, which, for convenience, is the same as exhibit "B" attached to the Complaint, and which is admitted in the Answer.

[fol. 21] By Mr. Ferguson:

Q. Mr. Biggar, has the Secretary of Agriculture issued any additional orders as to shipping dates for the avocados covered by the Federal Marketing Agreement since October 8, 1957?

A. Once again, Mr. Ferguson, I prefer to refresh my memory. I have a copy of the order. Order 14 was actually issued on October 10th, to become effective 12:01 A.M., Eastern Standard Time, October 14, 1957. These avocado shipping dates issued October 8th anticipated the Secretary's order, and encompasses the order issued effective October 14th.

Q. Has there been anything later?

A. No further shipping dates changed since that time.

Q. It is alleged in the plaintiffs' Complaint in this case, paragraph 11, and admitted in the Answer of the defendants, that grade standards of avocados handled under the Marketing Agreement 121, were by order of the Secretary of Agriculture effective May 21, 1955, as amended June 13, 1956. You have already made a statement to that effect, and the grade standards of June 13, 1956 are attached to the Complaint as exhibit "C". My question is has there been any amendment or amendaments of the grade order since June 13, 1956?

A. In order to clarify the situation as regards grade standards as compared to grade order, there has been no change as to standards, but there has been a change in the order. The Secretary of Agriculture issued amendment 7, [fol. 22] Avocado Order 14, on November 14, 1957, to become effective 12:01 A.M., Eastern Standard Time, November 18, 1957, which changed the grade requirements from a minimum of an AAC number 2 grade as set forth in the April 13th standards.

Q. Is that April 13, 1956?

A. Yes, April 13, 1956.

Q. I think I must have said "June". It is April, is it?

A. Yes.

Q. Go ahead.

A. —to a number 2 grade, containing not less than twenty-five percent number 1 quality.

Q. Was that order preceded by a recommendation of the Avocado Administrative Committee?

A. It was.

Q. What is the date of that recommendation?

A. Since again, Mr. Ferguson, this is a matter of date, I will have to refer to the minutes. That recommendation was made at the meeting of November 12, 1957.

Q. Let's see if the record is clear about these grade standards. You stated that they were established by an order of April 13, 1956, the order effective on that date?

A. Correct.

Q. And that these grade standards still stand?

A. Yes, they still stand.

Q. What has been the change?

[fol. 23] A. The change was to increase the quality or to increase the quality requirement from a straight AAC number 2 grade as a minimum to an AAC number 2 grade containing not less than twenty-five percent number 1 quality.

Q. Does that mean that since April, 1956 the minimum quality requirement for the shipping of Florida avocados is grade 2?

A. With certain periods in which we had no regulations. There are two distinct documents; one is a regulation and one is the standard. The standard has not been changed since 1956. The regulations have been changed from time to time.

Q. We have the grade standards of April 13, 1956. Since then, as I get it, there have been regulations prohibiting the shipment of avocados of certain grades?

A. Yes.

Q. Now, Mr. Biggar, will you tell us again what are these regulations and when they became effective?

A. Again I will have to refer to the orders themselves.

Q. If you will.

A. Referring to Avocado Order 14, issued May 21, 1957, to become effective 12:01 A.M., Eastern Standard Time,

May 26, 1957, which reads in part:

> "During the period beginning at 12:01 A.M., Eastern Standard Time, June 3, 1957, and ending at 12:01 A.M., Eastern Standard Time, April 30, 1958, no [fol. 24] handler shall handle any avocados grown in South Florida unless such avocados grade at least number 2 grade and meet the requirements of standard pack."

The first amendment that affected this particular factor, that is, the factor of grade, was amendment 7, which I have previously referred to, dated November 14, 1957, to become effective 12:01 Eastern Standard Time, November 18, 1957, which reads in part:

> "During the period beginning at 12:01 A.M., Eastern Standard Time, November 18, 1957, and ending 12:01 A.M., Eastern Standard Time, April 30, 1958, no handler shall handle any container of avocados grown in South Florida unless the avocados in such container grade not less than twenty-five percent number 1 grade, and the remainder at least number 2 grade."

Then it goes on to say:

> "Provided that not to exceed five percent of the containers in a lot may contain avocados which fail to meet such requirements if the entire lot is within the tolerance and meet the requirements of the standard pack."

Then it goes on to say:

> "The grade terminology shall have the same meaning as set forth in sub-section 969.130 of the supplementing [fol. 25] rules and regulations," and then this is a description of the April 13th standards.

Q. Does this last amendment of the grade standard regulations have a time limitation?

A. It is effective until April 30, 1958.

Q. And that is the grade standard now in effe. ?

A. Yes. Of course all regulations are on a year-to-year basis, in order to permit the incoming Committee to make its recommendations to the Secretary of Agriculture.

Q. So that the present regulation is a minimum requirement of grade 2 of which, however, at least twenty-five percent must be grade 1?

A. Yes, that is correct.

Q. Mr. Biggar, during the current year have you prepared and issued to the growers and handlers a series of weekly summaries of avocado shipments from the South Florida production area?

A. I have.

Q. Do you have them with you?

A. Yes, sir.

Q. Have there been twenty-nine such weekly reports?

A. I numbered them consecutively by weeks and my last report is number 29.

Q. Which means one report per week since then?

A. The first report, report number 1, is dated July 1, 1957, and it covers the period April 1 through June 15, [fol. 26] June 16 through June 22nd and June 23rd through June 29th, for the 1957-58 season, with comparative information for the period April 1 through June 30 for the 1956-57 season.

Mr. Ferguson: Will you, Mr. Reporter, mark these five pages as plaintiffs' exhibit 10 for identification?

By Mr. Ferguson:

Q. Mr. Biggar, these five pages marked now plaintiffs' exhibit 10 for identification are five of the twenty-nine reports, are they not?

A. They are.

Q. Were they selected as dates nearest the end of each month indicated?

A. They were for dates of issue.

Q. You mean the dates when you issued these statements; is that right?

A. That is right.

Q. Did you prepare these summaries of avocado ship-

ments yourself from records of the Avocado Administrative Committee?

A. Yes. These were taken entirely from the certificates of inspection issued by the Federal-State Inspection Service.

Q. On the copies here you list "Units for Florida Destinations", and you have a footnote there. Will you explain that footnote?

A. Close examination of the exhibit previously introduced of a Federal-State Inspection Certificate affecting avocados, will show the destination is not included. There [fol. 27] are certain avocados transported by common carrier which appear on the surface to be going out of the state but which in fact may in small quantities be delivered within the state. For instance, a "lot" may consist of sixteen hundred flats bound for a terminal market, and a small portion of this may be dropped in a Florida market en route to other destinations. The footnote there does not include "drop lots". There are other lots which we can determine are destined for Florida markets which could have been on their way out of the state from such terminals as Tampa, Sanford or Jacksonville to out-of-state destinations. The two quantities probably offset one another to a large extent.

Q. In your opinion is this tabulation substantially correct?

A. In my opinion this tabulation is substantially correct.

Mr. Ferguson: These five pages marked plaintiffs' exhibit 10 for identification will be offered in evidence.

By Mr. Ferguson:

Q. Is this the first season during which you have prepared such weekly summaries?

A. Yes, this is the first season that the attempt has been made.

Q. Has the 1957-58 shipping season ended?

A. No.

Q. Can you estimate how much longer it will continue?

A. This is the 21st day of January and I would estimate

that the season will be virtually over—there is no way of determining exactly—by February 15th. The bulk of the [fol. 28] volume will have moved by then, although we will still have some shipments after that date.

Q. Look at your last weekly statement dated January 13, 1958, which contains totals to January 11, 1958. Can you make a reasonably accurate estimate of the probable total for the entire 1957-58 season?

A. Within a range, yes. I wouldn't want to pin it down to the final bushel, but there will be between four hundred fifty thousand and five hundred thousand bushels in total.

Mr. Ferguson: Mark this page as plaintiffs' exhibit 11 for identification.

By Mr. Ferguson:

Q. Mr. Biggar, did you prepare the statement contained on the page marked plaintiffs' exhibit 11 for identification?

A. I did.

Q. What is the difference, if any, between the figures as stated in this exhibit 11 and the total figures stated in the January 13, 1958 page of exhibit 10?

A. The quantities have been converted to bushels.

Q. Otherwise they are the same?

A. Yes, rather than the units as stated in the form you previously mentioned.

Q. Units meaning what?

A. A unit means one-fourth of a bushel equivalent, whereas the term "bushel" has been used to indicate four flats or four lugs.

[fol. 29] Q. Was this done merely to make this conform with the upper part of the pages comprising plaintiffs' exhibit 10 in which the quantities are stated in bushels?

A. That is correct.

Mr. Ferguson: The plaintiffs will offer plaintiffs' exhibit 11 in evidence.

By Mr. Fergsuon:

Q. Mr. Biggar, I take it that you are acquainted with Dr. Roy W. Harkness of the Sub-Tropical Experiment Station in Homestead of the University of Florida?

A. I am.

Q. Do you know whether tests of the oil content of avocados are made at this Experiment Station upon application by growers and handlers of avocados in the South Florida Production Area?

A. It has been their practice and it is their practice to make such tests.

Q. Have you examined his records as to these tests?

A. I have.

Q. Were you permitted by Dr. Harkness to copy a record of such tests made upon application of Florida Lime and Avocado Growers, Inc., and also of the tests made upon application of Mr. Kendall of South Florida Growers Association, Inc.?

A. I was informed by Dr. Reuhle, the Director of the Experiment Station, and the Director in charge of the Sub-Tropical Experiment Station, that these records are public [fol. 30] records and are available to all concerned, and I was permitted by Dr. Harkness to make extracts from these records for a four-year period for each of the two plaintiffs.

Mr. Ferguson: May these four pages entitled "Oil Content Tests of Florida Avocados made at Experiment Station, Homestead, Florida, at Request of Florida Lime & Avocado Growers, Inc." be marked plaintiffs' exhibit 12 for identification, and the four pages entitled "Oil Content Tests of Florida Avocados made at Experiment Station, Homestead, Florida, at Request of South Florida Growers Association, Inc." be marked plaintiffs' exhibit 13 for identification?

By Mr. Ferguson:

Q. Did you personally make a copy of the Oil Tests as recorded at the Experiment Station?

A. I did.

Q. Are the entries in these two exhibits, plaintiffs' exhibit 13 and plaintiffs' exhibit 12 for identification, a correct recordation of what appears in the records at the Experiment Station?

A. They are.

Mr. Ferguson: I wish to state for the record that these lists of Oil Tests will not be offered in evidence until Dr. Harkness testifies as a witness in this case, but any prior reference to the contents of these exhibits will be subject to the testimony of Dr. Harkness.

By Mr. Ferguson:

Q. Mr. Biggar, looking further at these compilations, [fol. 31] plaintiffs' exhibits 12 and 13 for identification, there is an addendum at the bottom of each page, is there not, entitled "Shipping Dates Authorized by Regulations of U. S. Secretary of Agriculture Under South Florida Federal Marketing Agreement"?

From what source did you obtain the data in these footnotes or addenda?

A. The information shown at the bottom of each page under the heading "Shipping Dates Authorized by Regulations of U. S. Secretary of Agriculture", were extracted from the orders issued by the Secretary of Agriculture for each of the indicated seasons as indicated at the top of the sheet, and is covered by the Oil Tests for these particular seasons.

Q. These shipping dates are all included in exhibits heretofore identified, are they not?

A. No, not in all instances. That is true for the 1956-57 season.

Q. And 1957-58?

A. And 1957-58 through the exhibit 9.

Q. Where they go further back, did you take them from the Secretary's Orders?

A. Yes, I took them from the Secretary's Orders.

Q. And it is limited, is it not, to the varieties of which tests were made?

A. Limited to the pertinent varieties shown in the tests, [fol. 32] yes.

Mr. Ferguson: You may cross examine.

Mr. Fourt: I wonder if we might be able to have a recess at this time in order that I might be able to have access to the public file to which Mr. Biggar made reference?

Mr. Ferguson: Yes.

(Adjournment taken to 1:00 P.M. of the same day.)

AFTERNOON SESSION

1:00 P.M., January 21, 1958

Deposition resumed pursuant to adjournment.

Appearances: Same as heretofore noted.

DAVID M. BIGGAR resumed the stand and was examined and testified further as follows:

Cross examination.

By Mr. Fourt:

Q. Mr. Biggar, you mentioned and listed several counties through the State of Florida which constitute the northern limits of your marketing area; is that correct?

A. Yes.

Q. Is there a limited production of avocados in the State of Florida north of those counties?

A. I don't know.

Q. I show you plaintiffs' exhibit 3 for identification and ask you if you know the meaning of the item "Lot 59 Hse. 20"?

[fol. 33] A. Yes, I do.

Q. What are those designations?

A. This particular certificate number B-66158 represents 1874 quarter bushel F.B. boxes, which contains the markings as designated here, "Lot 58, House 20". The lot number 59 is a number issued to designate the week in which the fruit was picked. The house number is a number assigned by the Inspection Service to each house to identify the house. That is the means of reconciling these particular 1874 containers with this particular certificate, as a matter of identification, if you will.

Q. Were you personally present when this inspection certificate was made?

A. No.

Q. Do you know of your own knowledge whether the figure "1874 packages" constituted the entire lot of avocados shipped on that trailer described in plaintiffs' exhibit 3 for identification?

A. No, I do not. I was asked merely to identify that document as a form used by the Federal-State Inspection Service for the certification of avocados. I know nothing of that particular lot as such. Perhaps I could develop some information on that.

Mr. Ferguson: I can tell counsel now that there will be some testimony about that from the shippers.

By Mr. Fourt:

Q. Do you have any personal knowledge regarding the stamped impression which appears in the right center [fol. 34] of plaintiffs' exhibit 3 for identification which reads "Passed"?

A. I have observed a stamp similar to that placed upon this type of certificate, the yellow copy, at the State Road Guard Stations located throughout the northern portion of the state, to indicate that that shipment had cleared through that station, and that such was not available for reissue to pass a second lot.

Q. But you have no personal knowledge as to this particular stamp?

A. I have not been requested to search our records for information concerning this particular lot.

Q. Then it is correct that as to the stamp identification "Passed", you have no personal knowledge of that.

A. No, sir.

Q. Do you have any personal knowledge regarding the stamped impression "Inspected and Released" in the middle of plaintiffs' exhibit 3 for identification?

A. I have no knowledge whatsoever of that stamp.

Q. What is the governmental agency that makes inspections of avocados which are regulated by the Avocado Marketing Order?

A. The agency's name appears at the top of the inspection certificate. The exact wording of the title, I don't know.

If I may be permitted to refresh my memory with that exhibit, I can read it into the record.

Q. Please do so.

[fol. 35] A. "U. S. Department of Agriculture—Agricultural Marketing Service—Florida Department of Agriculture—Citrus and Vegetable Inspection Division".

That title describes the two organizations which cooperate in conducting these inspections.

Q. Mr. Biggar, a moment ago you were just reading from the top of plaintiffs' exhibit 3 for identification; is that right?

A. That is right.

Q. Do you have any personal knowledge as to who pays the salary of the inspector here at this agency, as to whether it is the Federal or State Government?

A. Anything I would say on that would be hearsay, because I have had no reason to check that closely.

Q. Does the Inspection Service which you described a moment ago come under the jurisdiction of the Avocado Administrative Committee?

A. No.

Q. Do you have any personal control over the inspection of avocados as regulated by the Agricultural Marketing Order?

A. No, sir.

Q. Plaintiffs' exhibit 5 for identification denotes that there is some Cuban production. Is that Cuban production composed of several varieties of avocados?

A. There are several varieties and a miscellaneous category referred to as seedlings.

[fol. 36] Q. In which category does the majority of the Cuban production fall?

A. In the category of seedlings.

Q. Do you have any personal knowledge as to why the designation of variety was removed from the grade certificate by the Inspection Service?

A. They considered it to be superfluous.

Q. I show you plaintiffs' exhibit 4 for identification and ask you if you have any personal knowledge regarding the origin of those statistics?

A. This is a summary of avocado shipments by varieties

and weeks for the 1955-56 season. The origin of this information for this particular season as described in this exhibit was the inspection certificates as issued by the joint Federal-State Inspection Service. At that time the certificates bore the variety designation.

Q. However, you have no personal knowledge regarding the observation of that fruit covered in plaintiffs' exhibit 4 for identification?

A. That question is not clear.

Q. In plaintiffs' exhibit 4 for identification, for the week ending July 9th, it indicates that in the week ending July 9th there were 1991 box equivalents of fruit shipped. Did you personally observe that fruit and count it?

A. The answer obviously is no.

[fol. 37] Q. And isn't that true with all of the statistics listed on plaintiffs' exhibit 4 for identification?

A. I relied entirely upon the documents presented to me by the Federal-State Inspection Service.

Q. And you have no personal knowledge as to the origin of these certificates other than as you have stated?

A. That is right.

Q. I now show you plaintiffs' exhibit 7 for identification and ask you if you personally observed the fruit and counted the boxes or bushels which are included in that year's tabulation?

A. As indicated in a footnote on that tabulation, I relied upon lines 1 through 13 of the documents submitted to me by the Federal-State Inspection Service, and upon lines 13 to 40 of the reports supplied to me by the shippers of the fruit. I did not personally count the fruit.

Q. I show you plaintiffs' exhibit 8 for identification and ask if you personally observed the fruit and counted the containers which are covered in that tabulation?

A. There are tabulations on this exhibit 8 for the State of California, the State of Florida and for the Nation of Cuba. I did not count, as previously testified, the fruit with respect to Florida, and had, of course, no access to the fruit having to do with California or Cuba. The answer is that I have not personally counted the fruit.

Q. Would that answer be the same as to the figures

[fol. 38] given for bushels shipped during certain dates as given on plaintiffs' exhibit 11 for identification?

A. It would.

Q. I now show you plaintiffs' exhibit 12 for identification and ask you at whose request did you go to the Sub-Tropical Experiment Station of the University of Florida to obtain this information?

A. I was requested to provide this information or this type of information by Mr. Fred Piowaty and Mr. Harold Kendall, and by Mr. Ferguson.

Q. Were you authorized to do so by a resolution of the Avocado Administrative Committee?

A. No, sir.

Q. Or by the Chairman of the Avocado Administrative Committee?

A. No, sir.

Q. You are the manager of the Avocado Administrative Committee, are you not?

A. That is right.

Q. And you were not requested to do this by the Chairman of the Committee?

A. No.

Q. Was this prepared in the course of your employment as manager of the Avocado Administrative Committee or as a personal favor to the persons mentioned?

[fol. 39] A. This particular extract was, as I considered it, a personal favor.

Q. Did you make the personal arrangements for mimeographing it?

A. I couldn't say I made personal arrangements in reproducing the specific information for the Committee.

Q. Referring now to plaintiffs' exhibit 12 for identification, was that reproduced by the offices of the Avocado Administrative Committee?

A. Yes.

Q. Is that also true of plaintiffs' exhibit 13 which I now hand you?

A. That is correct.

Q. Do you recall the approximate date when Mr. Piowaty, Mr. Kendall and Mr. Ferguson or any of them requested you to prepare this exhibit?

A. No.

Q. Would it have been right around January 1st?

A. I think my original answer that I don't recall, sir, would serve. I wouldn't want to venture a guess into the record of this nature.

Q. Where did you obtain the figures regarding the "geography"?

A. At the office of Dr. Roy Harkness at the Sub-Tropical Experiment Station of the University, Homestead, Florida, which is located on Waldin Drive, somewhat west of Redland Road.

[fol. 40] Q. Do you recall the approximate date that you visited this office?

A. Yes.

Q. When?

A. It was the latter part of last week, but I cannot recall the exact date, whether it was Thursday or Friday, however, I believe it was one of the two.

Q. Would it have been either Thursday or Friday, the 16th or 17th of January, 1958?

A. I just don't recollect. I can consult my office calendar and confirm it.

Q. Would it have been a day or two of those dates?

A. I will say that it was one day toward the last part of last week.

Q. How long prior to that date was the request made for you to prepare this information?

A. I don't recall.

Q. Would it have been more than a week?

A. I just don't recall.

Q. Were you compensated for doing this favor for these gentlemen?

A. In which way do you mean "compensated"?

Q. By the payment of money.

A. No.

Q. Do you have any personal knowledge as to who made [fol. 41] the request that this information be obtained or these tests made by the Sub-Tropical Experiment Station?

A. Only as shown on the information extracted from the records and reproduced.

Q. Other than that you have no personal knowledge?

A. No, not personal knowledge.

Q. With whom did you talk when the request was made to prepare plaintiffs' exhibits 12 and 13 for identification?

A. What do you mean?

Q. Well, did you talk with Mr. Piowaty and Mr. Kendall and Mr. Ferguson, or either one?

A. I talked to all three of the gentlemen at various times.

Q. Did they indicate to you the purpose for which they wanted the exhibit?

A. They indicated that it was a study of maturity.

Q. As a matter of fact, Mr. Biggar, didn't they indicate that they wanted to use it in a lawsuit pending in the Federal Court for the Northern District of California?

A. I don't recall the exact words.

Q. Well, at the time they made the request were you aware that there was such a lawsuit pending?

A. Yes.

Q. And did you understand that they were going to use this material as a part of the plaintiffs' case in that lawsuit?

A. I didn't know whether they would or not. I knew it [fol. 42] was possible.

Q. At the time the request was made did you know that Mr. Piowaty was an officer of the Florida Lime and Avocado Growers, Inc.?

A. No, I did not.

Q. At that time did you know that Mr. Kendall was an officer?

A. Let me qualify that statement. You mean did I have personal knowledge?

Q. Had you been informed that he was an officer?

A. Directly, indirectly or implied?

Q. Indirectly.

A. No.

Q. You had heard it?

A. I assumed that, but I wouldn't want to inject an assumption here.

Q. You don't know for a fact that he was, but you have heard it?

A. No. I don't know up to this very moment.

Q. At the time the request was made that you prepare these exhibits and obtain this information did you know

at least that Mr. Piowaty was an officer of the Florida Lime and Avocado Growers, Inc.?

A. At the time I had no occasion to recollect whether he was an officer of that or any other organization. I [fol. 43] knew he was connected with the firm.

Q. At the time the request was made were you aware that Mr. Kendall was an officer or at least connected with the South Florida Growers Association?

A. Yes.

Q. At the time Mr. Ferguson talked to you, were you aware that he was the attorney representing the Florida Lime and Avocado Growers, Inc.?

A. Yes, and others.

Q. And the South Florida Growers Association?

A. Yes.

Q. At the time the request was made, were you aware that it was the position of Florida Lime and Avocado Growers, Inc. and the South Florida Growers, Inc. that the California Oil Tests were invalid?

A. I have heard that contended from time to time by various persons.

Q. At the time the request was made were you aware that that was their contention?

A. Yes. I may have misled you somewhat, Mr. Fourt, in a statement I made previously.

Q. Please correct it.

A. I don't want any insinuation or anything of that nature to rest. I would like to call your attention to the Avocado Marketing Order number 969, summarizing avo- [fol. 44] cados grown in South Florida. Sub-paragraph (h) of 969.29, states that it is the duty of the Committee and of the Committee employees, according to my interpretation, to investigate the growing and maturity of vegetables and to assemble data in connection therewith. With that in mind, I did delve quite deeply into the subject.

Q. So far as you know, does the Avocado Administrative Committee consider itself a party to this litigation?

A. In no way whatsoever.

Q. Has the Committee or its Chairman given you any direction regarding your position in the litigation?

A. The question has not been raised by anyone. I have

cooperated with both sides, as you know, Mr. Fourt; I supplied you with quite considerable data also.

Q. With respect to the representatives of the industry, who are the members of the Avocado Administrative Committee?

A. The Committee is made up of nine members and nine alternate members. The members are drawn from two districts. District 1 contributes seven members and seven alternates; district 2 contributes two members and two alternates. The composition of district 1 embraces a member and alternate, plus four growers and three handlers. District 2 consists of one grower and one handler, as members and alternates.

Q. What is the geographical area covered by district 1?

A. District 2 constitutes all of the production area as defined earlier, less Dade County. District 1 consists of [fol. 45] Dade County.

Q. How are the operations of the Committee financed?

A. They are financed by an assessment placed against units of fruit shipped.

Q. Is it true that during the Committee's fiscal year ending March 31, 1957 that you received as Committee manager $3,750.00?

A. That is correct.

Q. And will you receive a similar amount for your services during the fiscal year ending March 31, 1958?

A. I was fortunate enough to receive a slight raise.

Q. What will be your salary this year?

A. $4,000.00.

Q. During the year ending March 31, 1957, there is an indication in the 1956-57 report that $326.38 was paid for maturity studies. To whom was that money paid?

A. That money was paid out, but I do not recall every entry now. However, I believe that part of that was paid for assistance in the form of a laboratory janitor to assist with the tests that were being conducted by the United States Department of Agriculture, and the purchase of fruit may or may not have been included in that.

Q. Where was that particular research project carried on?

A. In the Homestead area.

Q. At which laboratory would these operations have [fol. 46] been carried on?

A. The agency that conducted these tests moved out of the location they had with the County Agent, moving to some offices located in Coconut Grove. I don't recall the exact time of the move, but possibly these were conducted at 1102 North Krome Avenue, and part of them at the plaintiffs' production area. I don't recall the exact location of their offices at that time.

Q. What was the name of the agency that conducted them?

A. It is called the Maintenance and Improvement Section of the Agricultural Marketing Service, United States Department of Agriculture.

Q. Who is the immediate head of that particular organization?

A. By "immediate head" you mean—

Q. The man or scientist who is immediately in charge of the operation.

Mr. Ferguson: You mean for the State of Florida, Mr. Fourt?

By Mr. Fourt:

Q. Do you understand my question, Mr. Biggar?

A. No.

Q. Is this organization a Federal or State organization?

A. Federal.

Q. Who is the scientist in charge of the immediate station?

A. The immediate station at Homestead is a sub-station [fol. 47] of the Orlando station. The Orlando station—the work that has been done for our Committee, has been conducted by Dr. Paul L. Harding. I don't believe Dr. Harding is the head of the station in Orlando. I just don't know. I do know that he worked on the work we were interested in, and that he delegated part of his responsibility to Dr. Hatten in the sub-station. I believe he considers that Dr. Hatten is the senior scientist in his Miami sub-station.

Q. Would this be the station that is often referred to as being located at Chapman Field?

A. That is the name of the plant division of the Department of Agriculture, and it is commonly known in this area as Chapman Field.

Q. Who is the head of the research project over at Chapman Field?

A. I believe that is Dr. T. P. Hatten.

Q. Was it to him that this $326.38 was paid?

A. The money in that case would be to the assistant. We provided services, not money.

Q. To whom would the money have been paid?

A. I would have to search the records. I believe there were several people involved in that, because we didn't keep the same janitor at all times.

Q. Were these people working under and employed by Dr. Hatten?

[fol. 48] A. Let's say that they were paid to clean glass and things like that.

Q. Were they working under his supervision?

A. Yes, but I thought you said "employed by Dr. Hatten". There is a difference there, you know.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Administrative Committee, 1954-55 season, and ask that it be marked as defendants' exhibit A for identification.

Q. Is it true, Mr. Biggar, that the Avocado Administrative Committee is a Federal Agency in the sense that it has been formed and acts pursuant to the authority of the Secretary of Agriculture of the United States Federal Government?

A. That is correct.

Q. And is it true that defendants' exhibit A for identification is an official Government publication?

A. I don't know. That thought has never occurred to me.

Q. What would you identify defendants' exhibit A for identification as?

A. It is an annual report of the Avocado Administrative Committee for the 1954-55 season.

Q. Were you manager of the Committee during the period of time covered by this report?

A. I was.

Q. Of your own knowledge you know that this exhibit, [fol. 49] as far as the Committee is concerned, is an official publication?

A. That is correct. Based on the minutes of the Committee, it is accepted as an official report.

Q. On page 7 of defendants' exhibit A for identification appears a comment with respect to the varieties Waldin, Trapp and Booth 8 varieties, that the maturity regulations were removed too early in the season. Do you recall what happened?

A. You want me to familiarize myself with that statement?

Q. Yes.

A. Where is that paragraph?

Q. It is the bottom paragraph. What happened with the varieties Waldin, Trapp and Booth 8 as they were marketed?

A. That is a very ambiguous question.

Q. Did you write that particular paragraph?

A. Yes.

Q. What did you mean by the statement that the "Maturity regulations were removed too early in the season"?

A. Just exactly that. As mentioned there, the control period wasn't extended over a sufficiently long enough period. In my opinion they made a mistake there that particular season, which was reflected in the following season.

Q. In that year then there was a considerable quantity of fruit of these varieties which reached the market in immature condition?

A. I would say it reached the market in undesirable [fol. 50] condition. There were a number of complicating factors that went into that, so it would be difficult to determine exactly what the cause was.

Q. Were you apprised of the condition of the fruit when it reached the market?

Mr. Ferguson: It is not proper cross examination. It doesn't relate to anything in the direct examination, and it doesn't test the credibility of the witness.

The Witness: I would say that in this particular instance I was informed that the fruit arrived in a discolored

condition, partially due to a grade consideration and possibly due to the fact that our maturity restrictions permitted it. As I mentioned before, this has been rectified in subsequent seasons and repetition has not been observed. So as to this exact statement, sir, we had no cause to go further into it.

By Mr. Fourt:

Q. Is it true that the statement is made here:

> "To cite an example, during the week ending October 16th over twenty-four thousand bushels of Booth 8 avocados were shipped, many of which were not sufficiently mature or had been held under refrigeration so long that they arrived in the market in a badly discolored or soft condition"?

Did you know also that some of the fruit arrived in the market in an immature condition?

[fol. 51] A. Let me read just exactly what I did say. I said, "many of which were not sufficiently mature or had been held under refrigeration so long".

Q. As you recall at the present moment do you know whether you were informed as to the maturity of that fruit upon reaching the market?

A. No, only the condition.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Administrative Committee for the 1955-56 marketing season, and ask you to mark it as defendants' exhibit B for identification.

By Mr. Fourt:

Q. I show you defendants' exhibit B for identification and ask you to identify that document?

A. This is the annual report of the Avocado Administrative Committee for the 1955-56 season.

Q. Is that the official report of the Committee for that season?

A. It is.

Mr. Fourt: Mr. Reporter, I hand you a document which purports to be the annual report of the Avocado Administrative Committee for the 1956-57 season, and ask that you mark it as defendants' exhibit C for identification.

By Mr. Fourt:

Q. I show you defendants' exhibit C for identification and ask you to identify it, if you will?

A. This is the annual report of the Avocado Administra-[fol. 52] tive Committee for the 1956-57 season.

Q. And is it true that this report is an official report of the Avocado Administrative Committee for that season?

A. Yes.

Q. I now want to direct your attention to defendants' exhibit B for identification, particularly to the bottom paragraph of page 12, and ask you to read the paragraph, starting with "A secondary short-run effect".

Mr. Ferguson: I will interpose an objection to this as not being proper cross examination. It does not relate to any matters on the direct examination, and it is not calculated to test the veracity of the witness.

The Witness: I would like an instruction as to whether I should proceed.

By Mr. Fourt:

Q. Just go ahead and finish reading the paragraph.

A. I have read it.

Q. Is it true, Mr. Biggar, that you were the draftsman of defendants' exhibit B for identification?

A. This report was issued over the signature of Mr. Frank M. Kent, Chairman of the 1955-56 Avocado Administrative Committee. I prepared a substantial portion of this under his direction. I don't know whether you would construe that as being the draftsman.

Q. With respect to paragraph 3 on page 12, and at the top of page 13, of defendants' exhibit B for identification, [fol. 53] were you the author of that paragraph?

A. Co-author, I would say.

Q. At the time you wrote that paragraph was it your opinion that "A secondary short-run effect of maturity

regulations appears to be a tendency to encourage the picking of fruit of the regulated variety and size as soon as regulations permit, rather than to let some of it go until a later date in the season, as would normally be done in the absence of regulations"?

A. I wish you would restate that question.

Q. At the time you wrote this paragraph or at the time you co-authored it, was it your opinion that the short-run effect of maturity regulations appears to be a tendency to encourage the picking of fruit of the regulated variety and size as soon as regulations permit, rather than to let some of it go until a later date in the season, as would normally be done in the absence of regulations?

A. I wouldn't want to say that this was solely my opinion. I would say that it was the joint opinion of myself and Mr. Kent. If you take this paragraph of the report in its entirety, or this section of the report in its entirety, I would say that it would be a joint opinion, but I don't like to have you take fragmentary portions thereof and be quoted on it. I don't like to be quoted, as I consider I am being quoted now, out of context by taking just a small portion of a report and saying that is my opinion without further qualification. I might state that this report was [fol. 54] prepared to be considered in its entirety, and it wasn't prepared for bisecting.

Q. Would it not be fair to you if you were asked whether it was your opinion at that time, or you may explain your answer if you so desire?

Mr. Ferguson: I think the witness has already answered.

The Witness: I consider that that exhibit is offered in toto, and not just a fragmentary portion of it. If I were given a chance to pick out fragments of this report, I would pick out other sections to emphasize it.

By Mr. Fourt:

Q. Then would it be more correct to say that the language submitted on pages 12 and 13 of defendants' exhibit B for identification, represents the opinion that you held at that time?

A. I wouldn't go that far. I would say that it represents the opinion of the Avocado Administrative Committee who

issued this report, I being merely the tool of the Committee who prepared the report.

Q. Then would it be fair to say that this report does not reflect your opinion?

A. I don't want to take issue with you, but I want to point out that I was acting as an administrative agent of the Avocado Administrative Committee, as its manager, and not as a technical expert. I do not sit here as a technical expert. I sit here as an administrator and as such [fol. 55] do not consider myself as an expert on these matters. On these expert matters, I will refer you to my employers who are experts in the field.

Q. Then you personally do not vouchsafe the accuracy of any statements made in defendants' B for identification?

Mr. Ferguson: The exhibit contains statistical data and numerous statements of fact. It also contains discussions which are included as opinions, whereas the question put to the witness would make it appear that there is nothing in the report but statements of opinion.

By Mr. Fourt:

Q. Then, Mr. Biggar, is it your position that although you wrote, in conjunction with other members of the Committee, defendants' exhibit B for identification, that this work does not represent your views but represents other views?

A. Exactly.

Q. I direct your attention to page 14 of defendants' exhibit B for identification and ask you if you will read the paragraph entitled "1" which appears in the middle of the page?

A. Under "Quality and Orderly Marketing Recommendations"?

Q. Yes.

A. I have read it.

Q. Did you personally write that paragraph?

A. In cooperation with the members of the Committee.

Q. Perhaps subject to their direction?

A. All of this is subject to their direction.

Q. What did you mean when you wrote the last three [fol. 56] words of that paragraph, "disorderly marketing practices"?

Mr. Ferguson: I want to interpose the objection that this is not proper cross examination for the reasons already indicated.

The Witness: I want to clarify the fact that this report was typed by my secretary, who is not responsible for the opinions on this matter either. Now, what was your question?

By Mr. Fourt:

Q. When you used the language in this paragraph "disorderly marketing practices," as you use it in that paragraph, what did you mean?

A. That expression I believe was used to discourage a tendency to move volumes of fruit at irregular intervals. For instance, if you marketed one bushel this week and a thousand bushels next week, then one bushel the following week and a thousand the next week, that would be possibly disorderly marketing. If you divided the two thousand and two bushels equally among the four weeks, that would be in my opinion very orderly marketing.

Q. Would it be true that in order to constitute disorderly marketing practices in the Florida Avocado Industry that this increase in marketing of fruit would have to involve many thousands of bushels?

A. Not necessarily. I believe if you will refer to the other evidence submitted, the other exhibits submitted, you will find that our volume ranges upwards from less than one hundred bushels a week to more than thirty-four thou- [fol. 57] sand bushels a week in this particular season.

Q. Is it true that during the peak volume period of your season that it would take many thousands of bushels of additional shipments to constitute disorderly marketing practices?

A. I think that particular reference here is made to picking itself. Sometimes people choose to hold their fruit for early picking. In other words, we have a very complicated system in order to assure the market of getting matured

fruit by varieties, and that requires spot picking of these groves, and some growers complicate the orderly marketing system by withholding until all the weight restrictions are removed, taking a loss from drops, and of course that frequently causes a disorderly marketing condition perhaps with too much fruit at one time. In order to understand this, for instance, a man may be permitted to pick on a percentage of oil content, and he may choose not to pick it on a percentage of oil content—he may wait until his oil is up to twenty-eight percent instead of eight percent, however, he would be allowed to pick that fruit.

Q. I would like to direct your attention to defendants' exhibit C for identification, which is the 1956-57 AAC report, and ask if you will read to yourself the top paragraph on page 9?

Mr. Ferguson: Please note the same objection that I previously interposed, namely, that this is not proper cross examination.

The Witness: I have read it.

[fol. 58] By Mr. Fourt:

Q. Did you author that precise paragraph?

A. As I said before, in cooperation with the members of the Avocado Administrative Committee.

Q. What was meant by the words there "but lacked the precision in establishing maturity that is deemed desirable"?

A. I won't be quoted out of context.

Q. The sentence is:

> "Seedling maturity regulations tended to reduce the quantity of immature fruit of this type reaching the market, but lacked the precision in establishing maturity that is deemed desirable."

What was meant by the phrase "lacked the precision in establishing maturity"?

A. The Committee has bordered on a widely accepted acknowledgment that a universal test of maturity is a difficult, if not impossible, goal to reach. Various standards

have been measured from time to time, but to apply a uniform application to all varieties, it is an acknowledgment that we are still searching for, that is, a universal measure of maturity of avocados. We have not reached this goal, and the Committee recently recommended that we should not be deterred by the difficulties facing the solution of this universal problem, but to continue to search for a perfect measure of maturity which may apply equally well to all avocados, irrespective of source or variety.

Q. During the operation of the Marketing Order for the [fol. 59] past three years have there been any violations by itinerant truckers picking up avocados in Florida and taking them out of the state without obtaining a certificate within the State of Florida?

A. I am not in a position to say whether there have been violations. I don't believe that anyone could say whether there has been any violations.

Q. Well, during the period of time that the Marketing Order has been in effect have there been any convictions of persons who have violated the Marketing Order?

A. Do you want to qualify that, as you did the first statement, with "out of state"?

Q. In your answer you may qualify that.

A. I will qualify it. We have had several convictions, all of which have been within the state.

Q. What was the nature of the violations?

A. The violations were largely grade violations, fruit which failed to meet the grade requirements, not maturity standards; in other words, fruit which would meet the maturity standards but which had surface defects on the fruit that caused it to be ruled out for grade. Mostly the violations had to do with their failure to take inspection.

One of the requirements of the Federal Marketing Order is that each handler shall submit his fruit for inspection, and any failure to submit it for inspection is a violation of the Order. In some cases you may submit it for inspec- [fol. 60] tion when picked. Failure to submit the fruit for inspection puts you in violation. In this case most of the violations were merely failures on the part of people acting in the capacity of handlers to have their fruit inspected.

Q. Did it happen that these persons who were convicted for violating the Marketing Order,—were they registered under the Marketing Order as handlers?

A. We had no registered handlers convicted.

Q. Were those persons who were convicted in the category of small operators or in the category of large operators?

A. I do not have the list of those who were convicted before me, and I would have to check that list in order to completely classify those who have been convicted. We do not generally have readily available classifications of that type of thing.

Q. Does the Florida regulation as it is now written affect any other avocados than Florida avocados?

A No.

Q. Is it true that it affects only Florida handlers of avocados?

A. That is a statement that I would have to clarify. It affects any handler who handles avocados produced in Florida.

Q. Does the Florida Marketing Order affect California avocados which enter the State of Florida?

A. No.

Q. Is it true that avocados which can meet the Grade 1 [fol. 61] standard as defined in the Marketing Order, may at the same time be immature in the sense of the Maturity Regulations?

A. Technically speaking, no.

Q. Why is that so?

A. I will have to refer back again to that sub-section, if you will permit me.

Mr. Ferguson: It is attached to the Complaint as exhibit C.

The Witness: It reads: "Number 1 grade consists of avocados of similar quality characteristics which are mature but not overripe."

So if they were mature under the grade, they would be mature under the quality regulations. Therefore, technically speaking, avocados that would meet the number 1 grade could not be immature.

By Mr. Fourt:

Q. I show you plaintiffs' exhibit 10 for identification, which is also designated "AAC-412", and ask you if you have any figures on units of Florida production intended for California destinations?

A. As previously stated, the statistics issued covering Florida avocados as represented by our exhibit 3 which you have in your hand, the yellow copy, does not indicate destination.

Q. What was the source of the information regarding the units for Florida destination?

A. As I mentioned before, I am also manager of the [fol. 62] Lime Distributors Committee, which Committee receives certificates of a slightly different form. This certificate indicates the owner of the vehicle, the license number, the address of the vehicle, and also indicates the destination in the state or out of the state.

I have prepared for my own use a table showing the various license numbers of vehicles employed in transporting avocados to Florida destinations. The statistics are checked weekly against this table showing these particular license numbers, and these license numbers are used to determine what lots of avocados are going to Florida destinations. I previously stated, sir, that we realize that certain of these avocados go out of the state, and that there are some common carriers who deposit fruit in the state that we assumed to be going out of the state, and we have assumed that these two offset one another to a large extent, and it is my opinion that these figures shown at the bottom of this AAC-412, to which we are now referring, are in substance correct.

Q. Then the figures shown on plaintiffs' exhibit 10 for identification, which is also AAC-412, are approximate only?

A. In substance that is a correct statement.

Q. Is it true that you account for the difference between "total units packed" and "units for Florida destinations", by the units that go to other destinations, which destinations you don't know?

A. That is right.

[fol. 63] Mr. Fourt: Mr. Reporter, I hand you what purports to be minutes of a meeting of the Avocado Administrative Committee held on May 14, 1957, and I will ask you to identify that as defendants' exhibit D for identification. Also let the record show that I am showing defendants' exhibit D for identification to Mr. Ferguson.

By Mr. Fourt:

Q. I show you defendants' exhibit D for identification and will ask you to identify that document, please.

A. This is a copy of the minutes of the Avocado Administrative Committee, dated May 14, 1957.

Q. I will ask you to identify the two exhibits which are attached to defendants' exhibit D for identification?

A. I have two forms attached to the minutes. One is entitled "AAC-362—LAC-269," and it is entitled "Proposed Joint Budget—Avocado and Lime Administrative Committees, 1957-58 Season". The other one is identified for our record as "AAC-363", and is entitled "Report of Sub-Committee on Maturity".

Q. In your capacity as manager of the Avocado Administrative Committee on May 14, 1957, did you act as secretary of that meeting?

A. No.

Q. Did you attend that meeting?

A. Yes, sir.

Q. Who acted as secretary of that meeting?

A. The secretary of that particular meeting was Mr. [fol. 64] R. R. Kinard, the elected secretary of the meeting.

Q. To the best of your knowledge, does defendants' exhibit D for identification constitute a true and correct copy of the minutes of the meeting of the Avocado Administrative Committee held on May 14, 1957?

A. Once again I will refer you to the subsequent meeting of June 11, 1957, at which time these minutes were approved and adopted.

Q. Then it is true that to the best of your knowledge defendants' exhibit D for identification is a true and correct copy of the minutes of the meeting of the Avocado Administrative Committee held on May 14, 1957?

A. Yes.

Mr. Fourt: Now, Mr. Reporter, in order to save time, I will ask you to mark for identification as defendants' exhibits next in number the minutes of the meetings of the Avocado Administrative Committee dated June 11, 1957, July 9, 1957, August 13, 1957, September 3, 1957, September 10, 1957, October 8, 1957, November 12, 1957 and December 10, 1957.

(Said minutes marked defendants' exhibit E through L, respectively, all for identification.)

By Mr. Fourt:

Q. I show you defendants' exhibit E for identification and ask you if you will identify it, please?

A. Defendants' exhibit E for identification are minutes of the meeting of the Avocado Administrative Committee [fol. 65] of June 11, 1957.

Q. Now identify defendants' exhibit F for identification.

A. Defendants' exhibit F for identification are the minutes of a meeting of the Avocado Administrative Committee of July 9, 1957.

Q. Now identify defendants' exhibit G for identification.

A. Minutes of a meeting of the Avocado Administrative Committee of August 13, 1957.

Q. And now identify defendants' exhibit H for identification.

A. Exhibit H for identification are minutes of a "Telephone" meeting of the Avocado Administrative Committee held on September 13, 1957.

Q. Mr. Biggar, what is connoted by the words "Minutes of a telephone meeting of the Avocado Administrative Committee"?

A. First, I will refer you to the second amendment to the order regulating the handling of avocados grown in South Florida, reprinted from the Federal Register of May 21, 1957. It says, under Item 3, sub-section 969.30 (b):

> "The Committee may provide for simultaneous meetings of groups of its members assembled at two or three designated places, provided that such meetings shall be subject to the establishment of telephone com-

munication between all such groups, and the availability of loud-speaker receivers for each group, so [fol. 66] that each member may participate in the discussions and other actions, the same as if the Committee were assembled in one place."

Q. Is it true that the meeting of the Avocado Administrative Committee held on September 3, 1957 was held by the participants being in communication with each other by telephone?

A. Correct.

Q. Is it true that you participated in the conferences to the extent that you were in telephonic communication with the rest of the members attending that meeting?

A. Part of the meeting was conducted in the Committee offices at Homestead, at which location we have a special telephonic arrangement, with a loud speaker, by which a group assembled in one area can converse with the group assembled in another area or areas. I was present in the room at the time.

Q. I show you defendants' exhibit "I" for identification and ask you to identify it?

A. These are minutes of a meeting of the Avocado Administrative Committee held on September 10, 1957.

Q. I show you defendants' exhibit J for identification and ask you to identify same?

A. Defendants' exhibit J for identification are the minutes of a meeting of the Avocado Administrative Committee held on October 8, 1957.

Q. Identify defendants' exhibit K for identification.

[fol. 67] A. Defendants' exhibit K for identification are minutes of a meeting of the Avocado Administrative Committee held on November 12, 1957.

Q. And please identify defendants' exhibit L for identification.

A. These are minutes of a meeting of the Avocado Administrative Committee held on December 10, 1957.

Q. I show you defendants' exhibits "D" through "L" for identification, which you have previously identified, and ask if to the best of your knowledge and belief they constitute a complete set of the minutes of the Avocado Ad-

ministrative Committee during the period of time from May 14, 1957 to date?

A. I identified these individually, and have not had occasion to check to see if it is a complete list. I will be glad to check it, because I have a complete list here.

Q. Please do so.

A. If the reporter will call back to me the ones that I have identified, in the order in which they were identified, I will be glad to check them.

(Said check made between reporter and witness.)

The Witness: No; that is not all of them. We did not get the minutes of the meeting of April 9, 1957.

By Mr. Fourt:

Q. Exclusive of the minutes of the meeting of April 9, 1957, do defendants' exhibits for identification "D" through "L" constitute a complete set of the minutes of the meet-
[fol. 68] ings of the Avocado Administrative Committee from May 14, 1957 to December 10, 1957?

A. Yes. There was a subsequent meeting of Jan. 14th, the minutes of which have not been distributed. The minutes of the December 10th meeting were prepared at that time, and they are the official minutes. This is a sloppy way to check it, the way I did it, so I had better go back and check the ones that were called off because I may have missed some, some that I didn't check off. Having checked them off, I now state that these constitute a complete set of the minutes, with the exception of the one of April 9, 1957.

Q. To the best of your knowledge and belief do defendants' exhibits D through L constitute a true and correct list of the minutes of the meetings held on May 14, June 11, August 15, September 3, September 10, October 8, November 12 and December 10, 1957?

A. You said "list". Do you mean "copies of the minutes"?

Q. Yes.

A. I can only assume that they do. I have no reason to say anything to the contrary. I have examined them item by item, and they are complete as presented them to you.

Q. Is it true that these minutes were recorded and furnished in the usual and normal course of business of the Avocado Administrative Committee?

A. Yes.

Q. Are you personally acquainted with a person by the [fol. 69] name Fred Piowaty?

A. Yes, Mr. Fred Piowaty and I are very well acquainted.

Q. Who is Mr. Piowaty?

A. Mr. Fred Piowaty is a member of the Avocado Administrative Committee.

Q. During the 1956-57 season, was he Chairman of the Grades Sub-Committee and the "Handler Registration Sub-Committee", and a member of the Committee itself?

Mr. Ferguson: Of course all of these questions are under the objection as not being proper cross examination.

The Witness: Refreshing my recollection with the 1956-57 annual report, page 3, which has been submitted as an exhibit here, it lists Mr. Fred Piowaty as Chairman of the Grades Sub-Committee, as a member of the "Container Research Sub-Committee" and as Chairman of the "Handler Registration Sub-Committee".

By Mr. Fourt:

Q. Then is it true that in addition he was a handler member on the Committee?

A. Page 2 of this same report, which has been submitted in evidence as an exhibit, shows Mr. Fred Piowaty as a handler member from district 1.

Q. Are you acquainted with Mr. H. E. Kendall?

A. I am.

Q. Who is Mr. H. E. Kendall?

A. He is a present member of the Avocado Administrative Committee.

[fol. 70] Q. Does he serve in any other capacity or on any of the Committee or Sub-Committees of the Avocado Administrative Committee?

A. I would have to check the minutes for that. We have so many Sub-Committees that I have some difficulty in remembering who serves on which. I assume that he is, how-

ever, it would be reflected in the minutes, defendants' exhibits D through L.

Q. Is it true that Mr. Kendall was a member of the Avocado Administrative Committee during the 1954-55 season?

A. The annual report of the Avocado Administrative Committee for the 1954-55 season shows that Mr. Harold E. Kendall was a handler member from district 1.

Q. Is it true that he was a member of the Committee during the 1955-56 season?

A. He was a handler member from district 1 during the 1955-56 season.

Q. Is it true that Mr. Fred Piowaty was a member of the Committee during the 1954-55 season and the 1955-56 season?

A. During the 1954-55 season Mr. Fred Piowaty was a handler member from district 1. During the 1955-56 season Mr. Fred Piowaty was a handler member from district 1.

Q. Is it true that you serve at the pleasure of the Board?

A. Of course.

Q. A majority vote could remove you from office?

A. I understand that is true.

Mr. Fourt: No further questions.

[fol. 71] Redirect examination.

By Mr. Ferguson:

Q. Is it a part of the duty of the Avocado Administrative Committee under the Secretary's Order to aid in the investigation and furtherance of the prosecution in cases of violations of any of the maturity or quality regulations?

Mr. Fourt: I object to the question as leading. It doesn't prosecute anything. The Committee investigates and the prosecution is conducted entirely by the Secretary of Agriculture.

The Witness: Yes, it does that.

By Mr. Ferguson:

Q. I think you said something about violations within the state.

A. That is right.

Q. I think you also said that you knew of no violations with respect to shipments out of the state.

A. I know of none, but I would have to search my records on that.

Q. If there were a case of a shipment out of the state without a certificate of inspection by the joint Federal-State Inspection Service, would the Avocado Administrative Committee in due course of the performance of its duty participate in the investigation of such violation?

A. We would not actually investigate it. We would report the information which we had, if it came to us before it came to the Department of Agriculture, to the Internal Audit Division of the Department of Agriculture, who would conduct the investigation.

[fol. 72] Q. You were asked a question about a sentence that appears at the top of page 9 of the 1956-57 annual report of the Avocado Administrative Committee, the first word in the sentence being "Seedling".

A. That is right.

Q. What is a seedling?

A. A seedling is a tree which has been grown from a seed. Once again, sir, I must advise you that I am not skilled in the biological aspects. A seedling has the characteristics of the "parents"; in other words, it is not a nondescript individual.

Q. It is not yet a named variety and may never become one?

A. A seedling could be a named variety, but there may be only one tree. Once again, sir, I must advise you that this is out of my field, variety classifications and that sort of thing. I am not qualified to give a specific definition, however, a seedling is a single growth which someone may christen with the name of George, but it is not recognized by the trade as a variety.

Q. Turning to pages 18 and 19 of this same annual report, which pages have already been identified as plaintiffs'

exhibit 7 for identification, is there a tabulation under the caption "Seedling"?

A. There is a total of 13,124 bushels, which consists of seedlings, but in this particular instance, although it is not clearly indicated in the title, there are very few trees of fruit that have been tradenamed by individuals for personal [fol. 73] reasons as a rule, but not in sufficient quantity whereby recognition is given thereto other than as "seedling" or as an unlisted variety.

Q. Going back to page 8 of this same annual report, a copy of which has been marked as an exhibit in this case, is there mention of "Seedlings" in this schedule of shipping dates?

A. There is no mention of seedlings, but at the top of the page it is stated:

> "The following shipping schedule was applied to named varieties during the 1956-57 season."

Q. If the reporter will mark this page entitled "Avocado Shipping Dates, 1956-57 season", as plaintiffs' exhibit 14 for identification.

A. That copy has been marked to show subsequent changes after the date of the issuance of this particular copy, but my copy is not marked to show these subsequent changes. I think that later in the minutes—

Q. I don't think that is pertinent to the question I am going to ask you. Is this a true and correct summary of the shipping dates fixed by the order of the Secretary of Agriculture for the season 1956-57?

A. It is.

Q. Is it the same as page 8 of the annual report except that it has some additional matter at the bottom part of the page which is not reproduced on page 8 of the annual report?

A. Page 8 is a reproduction of this form that you have [fol. 74] just submitted as plaintiffs' exhibit 14 for identification, down through all of the named varieties. At the bottom of plaintiffs' exhibit 14 for identification there are some—

Q. Wait a minute. We will come to that. Is it down to the point on the page marked plaintiffs' exhibit 14 for identifica-

tion which begins with "All weights in ounces, diameters in inches"?

A. Yes.

Q. That is the end of page 8; is that correct?

A. Yes.

Q. Everything below that on plaintiffs' exhibit 14 is not included on this page 8?

A. That is correct.

Q. Now was there a regulation of shipping dates for seedlings in the 1956-57 season?

A. Yes.

Q. And is that regulation included in this completed statement of shipping dates now marked plaintiffs' exhibit 14 for identification?

A. Yes.

Q. On plaintiffs' exhibit 9 for identification, which has already been marked as an exhibit, is a regulation of shipping dates for seedlings?

A. Yes.

Q. Does this paragraph at the top of page 9 of this annual report relate entirely to the subject of seedling [fol. 75] maturity? Suppose you go ahead and read it and then answer the question.

A. That is right.

Q. Then you were asked whether the grade regulations included any requirement as to maturity and, as I recall, you answered by reading the grade regulation as to number 1 grade and the requirement that the avocados of that grade must be mature. Now I ask you to tell us whether there is a maturity requirement included in number 2 grade?

A. There is a maturity requirement in both number 2 and 3 grades.

Q. And there is a combination grade?

A. A combination grade of 1 and 2, and they have the same maturity requirement.

Q. Are there any other grades?

A. Numbers 1, 2 and 3, and the combination of 1 and 2 grades.

Q. Each of those has a maturity requirement?

A. Yes.

Q. And isn't it a fact that all other avocados are classified as culls?

A. No, sir, that is not the case: All other avocados are classified as unclassified.

Mr. Fourt: May the record note my objection to the leading questions.

By Mr. Ferguson:

Q. Are they called culls?

Mr. Fourt: Again I object to the leading question.

[fol. 76] The Witness: It is common practice within the industry to call them culls. In other places they might refer to them simply as "unclassified".

Paragraph (e) of sub-section 969.130, previously referred to, states:

> "Unclassified. 'Unclassified' consists of avocados which have not been classified in accordance with any of the foregoing grades. The term 'unclassified' is not a grade, as used herein, but is provided as a designation to show that no grade has been applied to the lot."

By Mr. Ferguson:

Q. Now, is there any regulation covering the shipment of avocados described as "unclassified"?

A. The regulations make no mention of "unclassified". The requirement is that the avocados at the present time must meet the minimum requirement of the Avocado Administrative Committee number 2 grade, containing not less than twenty-five percent number 1 grade, as previously indicated.

Q. That would prohibit the shipment of any avocados below the grade which you have just described, the combination 1 and 2?

Mr. Fourt: I object to the leading question.

The Witness: Section 969.54, entitled "Inspection and Certification", states:

"Whenever the handling of any variety of avocados is regulated pursuant to Section 969.51, each handler [fol. 77] who handled avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation."

That in and of itself would prohibit the handling of any avocados which were unclassified. This sub-section 969.54 requires that they all be classified, and the order as of the immediate moment would require that they meet the minimum of AAC 2 grade and contain not less than twenty-five percent number 1 quality fruit.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Mr. Biggar, directing your attention to plaintiffs' exhibit 9 for identification—

A. Is this the publication that I have entitled "Avocado Shipping Dates, 1957-58 Season"?

Q. Yes. It is also designated AAC-417. Isn't it true that the first regulation issued by the Avocado Administrative Committee during that season provided only for a "Date A" for one or more of these varieties?

A. I would have to check to see what that first one was.

Q. Let me rephrase the question. My purpose now is to establish the progressive nature of the regulation which is set forth in plaintiffs' exhibit 9 for identification. Is it true that insofar as plaintiffs' exhibit 9 for identification is concerned that the first regulation which is incorporated [fol. 78] in this exhibit provided only an opening shipping date which is called "Date A"?

A. I don't believe that is correct. I will check that right now. I will refer to the orders themselves, Mr. Fourt, since you are making reference not to the exhibits but to the orders preceding the exhibits.

Q. All right.

A. The first of these is the one that you requested. I am looking now at Avocado Order 14, the original order. This Avocado Order 14, the original order, fixed the date of the varieties, to the extent that they used the word "varieties", and it did fix other dates for seedlings and unlisted varieties.

Mr. Ferguson: I don't think he got your question. Perhaps you had better put it to him again.

Mr. Fourt: No; that is all right.

Mr. Ferguson: That is not an answer to your question.

Mr. Fourt: Let me proceed.

By Mr. Fourt:

Q. Subsequent to the regulations which established the dates in column "A" for the given varieties, isn't it true that the subsequent regulation would establish the dates which are listed in the column following, namely, "Date B"?

A. No, that is not necessarily correct. It might have been a change of date in column A. This order 14, issued on May 21st, to become effective at 12:01 A.M., Eastern Standard Time, May 26, was in the way of a general stop order, with respect to a number of varieties and dates, prohibiting the handling of those varieties before certain dates. It [fol. 79] also gave consideration to regulations affecting varieties not listed anywhere. It was issued, according to my knowledge, on the understanding that prior to the dates shown on this order, recommendations would be made to the Secretary of Agriculture, either recommending these same dates or other dates or additional dates.

Q. Now, directing your attention back to AAC-417, being plaintiffs' exhibit 9 for identification, and limiting my question only to the variety known as "Booth 8", wouldn't the first regulation for Booth 8 have established the opening date of September 16, 1957?

A. No. It would have set the date as September 9th.

Q. And that date is not shown in plaintiffs' exhibit 9 for identification?

A. No. The subsequent amendment to that shows the date of the 16th.

Q. Following the establishment of the date which appears in "Date A", then would the next succeeding regulation have established the date of September 30th?

A. Not the same one. The 16th order established the 30th date. Suppose we go to the specific amendment instead of talking off of the record, and this should be more enlightening to all of us.

Mr. Ferguson: Incidentally, this was pleaded and admitted by the Answer, each one of these maturity orders for [fol. 80] the 1957-58 season.

The Witness: The amendment that established the date September 16, 1957, in column "A", as shown in the exhibit, also established the "Date B" of September 30th, and the "Date C" of October 14th and the "Date D" of October 28th.

By Mr. Fourt:

Q. And what is the date of the order from which you just quoted?

A. The date of the order from which I just quoted, and the title of the order which I have just mentioned, is amendment 4 to Avocado Order 14, issued on September 5, 1957.

Q. Would that have been published in the Federal Register?

A. It would have been, but I don't know the number.

Mr. Ferguson: It is pleaded as FR 7173.

By Mr. Fourt:

Q. On what date was the regulation promulgated which established the withdrawal of all maturity regulations for the Booth 8 on the date of November 18, 1957?

A. Amendment number 5 to Avocado Order 14, section (f), item 5, reads as follows:

> "During the period beginning at 12:01 A.M., Eastern Standard Time, October 28, 1957, and ending at 12:01 Eastern Standard Time, November 18, 1957, no handler shall handle any avocados of the Booth 8 variety unless 2 15/16th inches in diameter."

Q. Do you have the Federal Register number for amendment number 5?

[fol. 81] Mr. Ferguson: Give me the date and I will give you the number.

The Witness: The effective date was 12:01 A.M., Eastern Standard Time, November 18th.

Mr. Fourt: I am talking about the date of the order itself.

Mr. Ferguson: The Federal Register number is 22 FR 7357.

The Witness: I believe the question was as to the date of the order. The date of the order is September 12, 1957.

Mr. Fourt: Mr. Reporter, I hand you a document headed "Recap of Effective Rules and Regulations Issued Pursuant to the Order Regulating the Handling of Avocados grown in South Florida," which is also designated "AAC-373", and will ask that it be marked as the defendants' next exhibit number.

By Mr. Fourt:

Q. I hand you a document now marked as defendants' exhibit M for identification and will ask you to identify it, Mr. Biggar.

A. The sheet is entitled "Recap of Effective Rules and Regulations Issued Pursuant to the Order Regulating the Handling of Avocados Grown in South Florida." It is further identified as form AAC-373, revised 11-12-57.

Q. Is this an official document issued by the Avocado Administrative Committee?

A. All documents issued by us are official, I presume. This was issued as a Secretary's Regulation, in fact, for [fol. 82] convenience of shippers and growers.

Q. It is an official document of the Committee?

A. The only official documents we have are our minutes and our financial reports. This is really a publication.

Q. Made in the pursuance of the administration of the Marketing Order?

A. Yes.

Mr. Fourt: Now, Mr. Reporter, I hand you a document entitled "Avocado Administrative Committee Rules and

Regulations", and will ask that you mark this document as defendants' exhibit N for identification.

By Mr. Fourt:

Q. Mr. Biggar, will you please identify defendants' exhibit N for identification?

A. Defendants' exhibit N for identification is entitled "United States Department of Agriculture, Agricultural Marketing Service, Avocado Administrative Committee Rules and Regulations, Grade Standards, as amended". It is reprinted from the Federal Register of April 13, 1956, and I would further identify it as sub-section 969.130.

Q. Is this regulation, defendants' exhibit N for identification, presently in effect?

A. Yes.

Q. When was its effective date?

A. I would have to see the original.

Mr. Ferguson: I wish to remind you, Mr. Fourt, that this [fol. 83] is exhibit C attached to the Complaint. If you want to offer another copy, that will be O.K. If you want a copy, you may detach the original exhibit from the Complaint. It is the same as exhibit C to the Complaint.

Mr. Fourt: May it be stipulated that defendants' exhibit N for identification is the same as exhibit C to the Complaint?

Mr. Ferguson: Yes.

The Witness: Mr. Fourt, do you want an answer to the question about the effective date, which I am in the process of picking out?

Mr. Fourt: Yes.

The Witness: The only thing I have here is something which shows notice of proposed amendment to rules, which is dated March 12, 1956, with a pencil notation at the top. I don't have a copy of the order itself, so I do not know the exact effective date.

Mr. Fourt: That is all.

Redirect examination.

By Mr. Ferguson:

Q. I wish to ask you a question for the purpose of clarification. You have referred to the fact that the Secretary issued a maturity regulation dated May 23, 1957, which was a restatement of the shipping date used in the preceding season; is that right?

A. I made a statement similar to that, yes.

Q. Listing forty-five named varieties?

[fol. 84] A. I have here the original of Order 14 which lists a large number of varieties, showing only one date. It is a list of forty-five varieties showing only one date.

Q. Did you send to the growers a bulletin of the kind that has been shown here, setting up this schedule of shipping dates?

A. No, I did not.

Q. What regulation comes next?

A. You mean subsequent to that particular one?

Q. Yes.

A. Amendment number 1 would have been the first change subsequent to that.

Q. Was that June 17, 1957?

A. Amendment number 1 is dated June 13, 1957.

Q. Perhaps I stated the publication date. June 13th is the date?

A. Yes.

Q. Is that your AAC-372?

A. You mean was that reported to the growers in the form of 372?

Q. Yes.

A. AAC-372, amendment 1, is the approved dates for Fuchs, Pollock, Simmonds, Hardee and Nadir.

Q. Five varieties?

A. Yes.

Q. And in each instance it gave a Date A, Date B, Date [fol. 85] C and Date D for each variety?

A. Yes.

Q. Is it not likewise true that in each instance where dates were assigned for additional varieties, that the estab-

lishment of each variety in each instance was the four dates that you have listed as Date A, Date B, Date C and Date D?

A. That is correct.

Q. And that was always the case?

A. Yes.

Q. On the Booth 8s you have a "Date A" and later a "Date B"—

A. I might say that the only time one date is used is in the form of a stop order at the beginning of each season when we are unable to determine the actual date. These dates are used for the purpose of establishing a stop order, listing the varieties, as a method of holding it up until such time as an accurate date can be determined.

Q. Just one further question. This exhibit 9 for identification, which is a summary of shipping dates for the 1957-58 season,—is this a true reflection of the orders as made for each of the varieties in each case, including the four dates?

A. As made and possibly as amended at later dates. I believe these first five remained unchanged, and it is possible that one of the subsequent amendments changed one or more of these dates. As of the time of the issuance of this AAC-417, which you have identified as plaintiffs' exhibit 9, that encompassed all of the amendments for all [fol. 86] of the varieties shown therein, as taken from the Secretary's Orders.

Q. Did each order and each amendment, after that first one that we have called a stop order, in every instance assign the four dates, A, B, C and D as you have them listed here?

A. Yes.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Isn't it a fact that AAC-417, which is plaintiffs' exhibit 9 for identification, was true and correct as of October 8, 1957, the date of this issuance?

A. As I explained earlier, it was in anticipation of regulations being issued on October 14th, in accordance with the recommendations that the Committee made on October 8th.

Q. As to one or more of these varieties, isn't it true that there may have been an amendment to the original date in each case until the later amended date would appear?

A. Correct.

Mr. Fourt: I have nothing else.

Mr. Ferguson: I think it would save some time if the reporter would mark these nine pages as plaintiffs' exhibit 15 for identification.

Redirect examination.

By Mr. Ferguson:

Q. Do these nine pages now marked plaintiffs' exhibit 15 for identification comprise all of the bulletins issued by [fol. 87] the Committee, setting forth the maturity orders made by the Secretary of Agriculture for the season 1957-58, other than the order which we have mentioned of May 23, 1957, that being at least its publication date?

A. Yes, it encompasses even part of that. It does state a portion of the missing order of May 23, 1957, but it doesn't list the schedule as such. It does include a mention of the shipping dates that you have on there, and perhaps the last six or seven remain unchanged pending further recommendations as the season progresses.

Q. Now turning to the second page of this bulletin AAC-372, dated June 13, 1957—you have already answered that that lists five varieties and four dates for each variety; is that correct?

A. Yes.

Q. Is that an exact copy of the Secretary's Order?

A. Yes.

Q. And the page dated July 11, 1957—

A. That lists five additional varieties.

Q. And so that makes a total of ten that you have mentioned?

A. Yes.

Q. And this is a copy of the order?

A. Yes.

Q. The next one is dated August 14, 1957.

A. Yes; that added one.

Q. Added one more?

[fol. 88] A. Yes; Fairchild.

Q. And the one of September 11, 1957, does that add some more varieties?

A. It contains twenty-four varieties.

Q. And in each instance with how many dates?

A. All four dates.

Q. Is that an exact copy of the Secretary's Order?

A. Yes.

Q. Does this bulletin of September 11, consist of two pages, one marked AAC-405, and one marked AAC-407?

A. Yes.

Q. Does AAC-405 contain a preliminary schedule for some more varieties?

A. Yes.

Q. Does AAC-407 show that this preliminary schedule has been made official by approval of the Secretary of Agriculture?

A. No.

Q. It does not?

A. No. This schedule shown on AAC-407, is a recapitulation of the maturity dates, issued by the Secretary of Agriculture up to and including September 11th, named varieties and seedlings alike.

Q. What is the next one?

A. The next one is dated October 9, 1957, and it is designated AAC-418, bulletin 57/58-8, and it refers back [fol. 89] to the preliminary schedule, AAC-405, and indicates approval and recommendations by the Committee of these dates. It also calls attention to all concerned to the pink schedule, which we have here as exhibit 9, which is a recapitulation of all of the weights and dates and sizes in their final form.

Q. You have already stated that although this is published as of October 8, 1957, it was a few days later before it was made an official order by the Secretary of Agriculture?

A. That is right.

Q. Now again, and finally, in each instance when another variety was issued, or when another variety was named, the four dates are assigned, namely, A, B, C and D?

A. Correct.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. During the 1957-58 season to date has the Secretary of Agriculture declined to issue any of the orders recommended to him by the Avocado Administrative Committee?

A. Yes.

Q. In what respects or can you give some examples?

A. I can't tell you right offhand, but I can go back through the recommendations and through the orders and try to pick them out, where the Committee has recommended action and the Secretary of Agriculture refused to issue orders thereon.

Q. Did the Secretary of Agriculture decline to issue any [fol. 90] maturity regulations recommended to him by the Avocado Administrative Committee?

A. No.

Q. Is that same situation true with respect to the maturity regulations issued by the Secretary of Agriculture in the 1954-55 season and the 1955-56 season?

A. You mean have they always followed the Committee's recommendations?

Q. As to maturity only?

A. Yes.

Q. Is the same thing true of the season 1956-57 as to maturity regulations only?

A. As to avocados produced in Florida the Secretary has always followed the Committee's recommendations.

Mr. Fourt: That is all.

Redirect examination.

By Mr. Ferguson:

Q. One further question. At the meetings when these recommendations were made by the Avocado Administrative Committee, was there present a representative of the Secretary of Agriculture?

A. I cannot vouch for every instance, but in practically every instance, the answer would be yes. I believe there was one meeting, the telephone meeting, when we didn't have a representative of the Department of Agriculture present. We have quite a large number of representatives of the Department of Agriculture at each meeting, but [fol. 91] they may not be the direct representative of the Secretary as a field representative. I believe in most instances, in fact I am sure, that we have had a full representation present to observe the proceedings.

Q. Would it be the same man in each of these meetings?

A. No. Sometimes the Orlando field representative in Florida is present, or he sends his assistant. At times these meetings are attended by Mr. M. F. Miller, as the Florida field representative of the Department of Agriculture, Marketing Division, and his assistant, Mr. W. R. Cleveland, has attended meetings in his place at times.

Q. Do you have any personal knowledge of what happens in Washington after these recommendations are sent there?

A. No, sir.

Mr. Ferguson: That is all.

And Further Deponent Saith Not.

David M. Biggar, Deponent.

(Adjournment to 9:30 A.M., January 22, 1958.)

[fol. 92] Resumed at 9:30 A.M., January 22, 1958.

Appearances: Same as heretofore noted.

Dr. Roy W. Harkness, a witness on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Dr. Harkness, will you please state your name in full?

A. Roy W. Harkness.

Q. Where do you live?

A. I live in Homestead, Florida; Route 1, Box 426.

Q. What is your profession?

A. I am a chemist with the Sub-Tropical Experiment Station.

Q. Are you classified as a plant chemist?

A. No; I am listed as an associate chemist there.

Q. In what field of chemistry?

A. I have been working in various fields. I have been working some on plant nutrition, and also have been working on the maturity of avocados and mangoes.

Q. What has been in general your training and experience?

A. Previous to coming to the Experiment Station?

Q. Yes; going back even to your school days.

A. Well, I got my Ph.D in Physical Chemistry at the University of California in 1928. I worked for the Department of Agriculture in Washington on Catalysis Research, [fol. 93] in the research laboratories of fixed nitrogen. I worked there until 1935, I believe, and then I worked for the Houdry Products Corporation of Pennsylvania, in their research department, until 1946, and since that time I have been at the Experiment Station down here.

Q. Is this an Experiment Station of the University of Florida?

A. Yes, it is.

Q. What is your position there?

A. Associate chemist at the present time. I started as an assistant chemist.

Q. And you have been at this Experiment Station how long?

A. Twelve years now.

Q. Are you a member of the faculty of the University of Florida?

A. Technically, yes.

Q. You have already indicated that you have engaged in research work on the subject of maturity of Florida avocados?

A. Yes.

Q. What was the purpose of that research?

A. The original purpose was to try to find some means of indicating when the avocados would mature.

Q. You were seeking a scientifically valid method of determining maturity?

Mr. Fourt: I object to the question as leading.

The Witness: Yes.

[fol. 94] By Mr. Ferguson:

Q. Doctor, was this research project of the University of Florida, to which you have referred, given some designation by number?

A. Yes. It started originally before a number was given to it, but after we had been working on it for some time we wrote up a project statement and it was given a number at that time. I will have to look up the number, if you wish to know the number.

Q. It would be convenient to have it, Doctor.

A. The number is 675.

Q. When did this research which you undertook on the subject of maturity of Florida avocados begin?

A. I believe it started in the fall of 1951.

Q. At whose request was it initiated?

A. Well, it was partly on our own consideration of the need of it, and partly on our own consideration of the Experiment Station, and also at the request of avocado packers and growers.

Q. Where was the research carried on?

A. At the Experiment Station.

Q. In this research project, did you give consideration to the measure of oil content of the fruit as a possible standard of maturity?

A. Yes, we did.

Q. What experimental work, if any, did you do with reference to the oil content of Florida avocados?

A. That was the principal part of the research at first. [fol. 95] We started out by measuring the oil content of avocados at various times through the season, starting at a time at which we thought they were still immature, and continued on through the period in which the various varieties were picked for the market.

Q. In what years were those oil content tests made?

A. Every year from the fall of 1951 on we made some oil content tests.

Q. These oil tests were all made at the Sub-Tropical Experiment Station?

A. Yes.

Q. Where and how were the samples obtained?

A. They were obtained from various groves throughout Florida. Some was fruit grown at the Experiment Station, and quite a portion was from various commercial groves in and around Dade County, and very few from groves in other parts of the State.

Q. In general, Doctor, when were these oil content tests made in relation to the time of the picking of the fruit?

A. In a large proportion of the cases, sir, they were made on the same day, or they were made within two days after picking, excepting in the case of certain special investigations which we were making as to the oil content, they were made within two days after picking. In other words, aside from these special investigations, the oil content tests were made within two days after picking, and usually on the same day.

Q. What method did you use to test the oil content?

[fol. 96] A. We used exactly the method used in California, with the halowax oil and the shaker bomb.

Q. What equipment did you use?

A. We used the shaker bomb, and we used the refractometer for getting the refractive index, and also miscellaneous laboratory equipment.

Q. Do you know where you got the equipment?

A. The refractometer was gotten from one of the chemical supply houses, one of the main chemical supply houses here, and the shaker was bought from a firm in California which makes shakers out there. I have forgotten the name of the company.

Q. Did you keep a record of these oil tests?

A. Yes, we kept a record of all of the oil tests.

Q. Do you have that record here?

A. Yes. That record is in these two books where these papers are placed in the books. These are the original records.

Q. Do you have a typewritten copy?

A. Of many of them, but not all of them. All of the original records are in these two books.

Q. Would you please add to your last answer a statement of the page numbers in the books? Possibly you can do that better than I can.

A. Here is one book which I have designated as number 7.

Q. Book number 7?

A. Yes. Starting on page 30, we have data for 1955, [fol. 97] starting in November. On page 32, we start with October, 1956, and we run over to page 89.

Q. Continuously from page 32 to page 89?

A. No, they are not continuous. They go over to page 46.

Q. Pages 32 over to 46?

A. That is right. That is December, 1956. On page 50, we start in with July 13th, 1953, and to over to page 90, which is January, 1954.

Q. You mean that page 90 begins 1954?

A. It ends on January 2nd. On the same page I started in with June, 1954, being page 90.

Q. Do you have more pages there for 1954?

A. Yes, over to page 95, which is October, 1954. Then it is continued on page 110 over to page 123, which is January, 1955. On that same page I start in with May, 1955, there being just one page there. Then over to page 126, which is June, 1955, to 129, which is November, 1955.

I will start now with the next book, book number 8. In my book, book number 8, on page 78, I have October, 1957, to page 80, being November, 1957.

Q. Doctor, I didn't catch anything for 1952.

A. Apparently I don't have those in these books; apparently 1952 is in other books.

Q. You have it in some other form with you this morning?

A. I have some typewritten results, yes.

[fol. 98] Q. May I see those?

A. Yes. Here is a typewritten summary of some of the 1952 data.

Q. You have handed me seven typewritten pages. What is recorded on these seven pages, in general, Dr. Harkness?

A. In general, sir, it is a comparison of the oil content of different fruits on the same tree, of different trees in the same grove, and of different groves. Some of them are the Lula variety and some of them are the Booth 8 variety.

Q. Are the entries on these typewritten pages taken from book records such as books 7 and 8?

A. Yes.

Q. But they are not as comprehensive as in the books?

A. No.

Q. Are there other matters reported in these books, numbers 7 and 8, and similar books, of the Experiment Station?

A. Yes, there are other things recorded in them. Book 7 is entirely on avocado research, and book 8 is on mango research, as well as avocado research.

Q. That is a rather helpful statement, Dr. Harkness. Book 7 relates to avocado tests only.

A. Book 7 all relates to avocados, but not all of the pages relate to oil content tests. There are a few pages on leaf analyses, and there are twenty pages on respiration studies of avocado fruit.

[fol. 99] Q. You have already designated the pages which contain the oil content tests?

A. Yes.

Q. Now I will ask you the same question as to book number 8. Are the only pages in that book which record oil content tests, pages 78 to 80?

A. Yes, I believe so. Most of the rest of the book is on mango maturity work.

Q. May I again see the typewritten pages?

A. Yes.

Q. To what years are the entries on the typewritten pages limited?

A. 1952, 1953 and 1954.

Q. Three years?

A. Yes.

Q. Let me ask you this question, Dr. Harkness: If we are permitted by you to make photostatic copies of the pages which you have indicated in these two books, with the books being returned to you during the day or at least by tomorrow, would we then have a record of all of the tests made in the years beginning 1953?

A. Yes.

Q. And then if we took the entries for 1952 on the typewritten pages, likewise to be photostated and returned to you, would we have a complete record; is that correct?

A. You would not have all of the record pertaining to 1952, the early part.

[fol. 100] Q. We would only have part of 1952?

A. That is right. You would have a large part of it, but not all of it.

Q. And the 1953 and 1954 entries in the typewritten form would be a duplication of what we found in books 7 and 8?

A. That is right.

Mr. Ferguson: Now, with leave of the witness, I propose to have photostats made of the pages indicated in books 7 and 8, and for simplification, although I realize that there is some duplication, including the seven typewritten pages, all of which have been marked collectively as plaintiffs' exhibit 16 for identification—in other words, when the photostats are obtained I propose to offer the photostats in evidence. All I am asking of counsel now is an understanding that no objection will be made on the ground that we are using photostats.

Mr. Fourt: No objection will be made to the use of photostats, but we are not stipulating that they may be introduced in evidence.

By Mr. Ferguson:

Q. Now, Dr. Harkness, what was your personal part in the making of these oil tests?

A. In some cases, particularly with the early ones, I made the determination myself. Later on, I supervised them.

Q. That applies to all tests recorded in these books?

A. They were all made under my supervision.

[fol. 101] Q. And do you say that they are true and correct?

A. Yes, to the best of my knowledge.

Mr. Ferguson: Now, Mr. Fourt, if you wish to examine on voir dire at this point, you may do so.

Mr. Fourt: May I see books 7 and 8, as well as the seven typewritten sheets?

Mr. Ferguson: You certainly may.

Mr. Fourt: Rather than interrupt at this time to examine on voir dire, could we defer that until the time for cross examination?

Mr. Ferguson: Yes.

By Mr. Ferguson:

Q. Dr. Harkness, did you in each of the years 1952, 1953, 1954 and 1955 publish any Florida Agriculture Experiment Station reports and statements of the nature of your studies on State Project 675, and your conclusions or tentative conclusions?

A. Yes, I did.

Q. Do you have with you copies of those volumes for the four years I mentioned?

A. Yes, I do.

Q. Will you please check these page references and see if they are correct? Your 1952 report is at page 287?

A. Correct.

Q. Your 1953 report is at page 329?

A. Correct.

[fol. 102] Q. And your 1954 report is at page 292?

A. Correct.

Q. And your 1955 report is at page 315?

A. Correct.

Q. Now, Dr. Harkness, will you please tell us what observations you made in the course of this research project regarding the oil content as a standard of maturity for Florida avocados?

A. Well, the observations I made are written up in these reports.

Q. We must hear them from you, Doctor.

A. Well, do you want me to read them?

Q. If necessary to refresh your recollection.

Mr. Fourt: To which we will object. This is the type of matter that we feel we should make objection to at this point. Reading of the material into the record of course does not obviate our objection to their materiality.

By Mr. Ferguson:

Q. I am not asking you, Dr. Harkness, merely to read the report. I am asking you to now state your observations, and in the course of your statement you are at liberty to refer to any papers that will help your recollection. I take it that your answer will be predicated upon your own recollection.

A. Several observations were made in regard to the value of oil content. One was that several of the earlier varieties matured to a satisfactory quality as judged by [fol. 103] the people who eat them at a point at which time the oil content was in the range of three to six percent.

Later in the season the late maturing varieties did not reach or approach edible condition, as judged by the people who ate them, until the oil content was comparatively high, perhaps seven to eight percent, or even higher. In other words, the quality of the avocado, as judged by the people who ate them, did not correlate with the oil content when you consider all of the different varieties together. In other words, the early varieties would begin to attain maturity before the oil content ever reached a high value. I don't want to be exact on this without looking at the book, but I believe the book will show that the Pollocks showed an oil content of five percent. The Waldins did not reach eight percent, let's say, until December, which is the normal time for picking Waldins.

In our research work we made it possible that the real measure of maturity was the quality of the avocado as judged by the people who eat it.

We were not looking for any particular food value; it was just a matter of having a fruit which was enjoyable to eat and at the same time one which would have a satisfactory food value. There was no attempt to arrive at a measure of the value of the fruit based upon the number of calories or anything like that.

Aside from that, we ran into serious difficulty in using oil content as a measure of maturity because of the variability of oil content we found in different fruit.

[fol. 104] Then on the same tree fruit picked at the same time would vary a large amount. The fruit would look alike and would be off of the same part of the tree, but when the oil content was determined there would be a three percent difference in the oil content; for instance, one fruit might contain six percent and another nine percent, off of the same tree. There was no correlation that we could find between the variation in oil content and the flavor of the fruit.

If we took an average of ten fruit from a given tree, we would get a certain value which we could duplicate fairly well, and if we took ten more fruit from the same tree, and compared them with the other ten as to oil content, sometimes we would find a measurable difference between the two trees, even in the same grove. Then if we averaged up the different values taken from the different trees in the same grove, on the same variety, and compared those with similar averages obtained in another grove, we might then get different values in the other grove. In other words, we couldn't observe any differences in the eating quality of the different fruits or different values from the different groves. While admitting that we didn't actually run any taste panels to afford conclusive proof that the flavor was the same, we did observe, from two or three observations, that they didn't show any taste variation.

Q. You mean difference in flavor?

[fol. 105] A. Yes, in spite of the difference in oil content. These variations between different groves were sometimes

very great. For example, in this typewritten data, which has already been submitted here, but which is also given more emphasis in the annual report,—just glancing at that data here, you will see certain observations. To illustrate, from one block of trees at the Experimental Station, the Lula variety, around the latter part of November, ran around ten to thirteen percent oil. The oil variation in another block of trees at the Experiment Station, at that same period, ranged from six to nine percent oil.

Q. Dr. Harkness, incidentally, how is the station grove designated in the record?

A. One is designated as block 9, and these block numbers refer to ten acre blocks. As I said, one is block 9, and another is block 5. It so happens that in the case of these Lula trees, the block 9 trees are much younger than those in block 5. The block 5 trees are quite old, twenty years or more, and the block 9 trees are less than ten years old.

Q. Was there any variation corresponding with the age of the trees?

A. We didn't find that constant variation in other groves. It so happened that these two groves were different, and it so happens that they were of different age, however, we drew trees of different ages from commercial groves, and we failed to find such a constant variation.

[fol. 106] Q. Doctor, if I may inject this question, did all of these trees in the station groves receive the same treatment in the way of fertilizer?

A. The fertilizer program was very nearly the same, and the spray program, to the best of my knowledge, was identical. One of these groves, block 9, was a grove where limited fertilizer tests were being run, and certain trees received an application of magnesium, and certain others didn't receive it; however, those two treatments showed no difference in the oil content.

Our general conclusion about oil content as a method of measuring maturity of avocados was that it would be very difficult to apply on account of these variations between different fruits and different trees in different groves, which we had no way of explaining, and to the best of our knowledge did not correlate with the quality of the fruit.

Q. That would be within the same variety?

A. Yes.

Q. Of course if the question is broadened, do you have an opinion whether a fixed percentage of oil content is a scientifically sound standard for maturity of all varieties taken together?

A. Well, it seems to me that it is not scientifically sound to use one measure for varieties of any kind of fruit that varies as much as the different varieties of avocados.

Q. In addition to State Project 675, and particularly in the years 1954, 1955, 1956 and 1957, were oil tests of [fol. 107] avocados made at the Sub-Tropical Experiment Station by you or under your supervision upon application by growers and handlers of avocados in Florida?

A. Yes, they were.

Q. Were those limited to any particular area?

A. No. Our policy was to make oil determinations in limited number for any grower or packer who brought the avocados into us.

Q. Did you make a record or cause one to be made of these oil tests?

A. Yes, they were all recorded in these books.

Q. Are they included in these books 7 and 8?

A. Yes, they are included on the pages which you already have.

Q. Is it indicated in the record in each instance who applied for the oil tests?

A. The designation in the book is either the person who brought the fruit in or the grove from which the avocados came.

Q. Are these records of each test segregated some way in the book?

A. Only by date. There are six or seven by date.

Q. Can you tell us on what pages we would find them?

A. They are on some of these pages which you already have. As a matter of fact, they are listed chronologically by year. For instance, all of these in book 8 were run at [fol. 108] the request of someone else, and all of those in the year 1956, as well as 1955. Prior to 1955 some were requested at times and others were for our research program.

Q. Doctor, if you will please look at these pages which are marked for identification as plaintiffs' exhibits 12 and 13—

A. I have seen copies of those. I think I have copies here.

Q. Have you had an opportunity to compare the entries on these exhibits with the entries in your book?

A. Yes, I compared a few entries on each of these pages with entries in my book, and in each case where I compared them they checked.

Q. Do these exhibits, plaintiffs' exhibits 12 and 13 for identification, correctly list the oil tests applied for by Florida Lime and Avocado Growers, Inc. and by Mr. Kendall, of South Florida Growers Association, Inc.?

A. As far as I checked them, they are correct and represent what they say.

Mr. Ferguson: I will now state to counsel that upon the testimony of Dr. Harkness exhibits 12 and 13 will be offered in evidence.

By Mr. Ferguson:

Q. Just one other question, Dr. Harkness: Were these tests to which you have been testifying composite tests of a number of fruit studies or simply separate tests of the individual avocados?

[fol. 109] A. In nearly all cases, but not all of them, they were composite samples of several fruit and the number is designated here on the sheet.

Q. So that the resulting percentage represents then the average of the number of avocados forming the sample in each instance?

A. That is right.

Mr. Ferguson: You may cross examine.

Cross examination.

By Mr. Fourt:

Q. Dr. Harkness, who is your immediate supervisor at the Experiment Station?

A. Dr. George D. Reuhle.

Q. What is his title?

A. I think he is director of the Station.

Q. I take it, Dr. Harkness, that your salary is paid by the University?

A. Yes.

Q. With respect to the avocado maturity studies at the Experiment Station, when did they first begin, approximately?

A. Approximately in 1951.

Q. Were you engaged in that experiment at its inception?

A. Yes.

Q. Dr. Harkness, I show you your book number 7, at page 30, and ask you if you have any personal knowledge as to the source of the sample which is on the top of the [fol. 110] line where the "Weight" is 1784?

A. You mean the source of the fruit?

Q. Yes. I mean personal knowledge to you as distinguished from what someone may have told you.

A. I didn't see the fruit when it was brought into the laboratory.

Q. Insofar as source of that particular sample is concerned, you would have to rely on what someone told you?

A. Yes.

Q. Would that be true of all of the fruit covered in all of the tests indicated in books 7 and 8, and also in the mimeograph sheets?

A. No, not all of them. It is not true of the ones that were taken for research purposes. I would have to check through to tell you which ones it is not true for, but much of that fruit I do have personal knowledge of.

Q. Is it true that the fruit of which you have personal knowledge as to its source, would be the fruit that came from groves 5 and 9 at the Experiment Station?

A. It would include those, yes.

Q. Doctor, I show you plaintiffs' exhibits 12 and 13 for identification, which purport to be copies of entries in your books 7 and 8; is that correct?

A. Yes.

Q. As to those samples where the tests were made at the [fol. 111] request of South Florida Growers Association, Inc., which is shown on plaintiffs' exhibit 13 for identifica-

tion, would you have personal knowledge of the source of that fruit and the conditions under which it was picked?

A. In most cases, sir, I did not see the fruit until it came into the laboratory.

Q. Could you say that that would be true in ninety percent of the cases as to the fruit submitted to you by South Florida Growers Association, as shown by plaintiffs' exhibit 13 for identification?

A. Yes, I believe that would be true regarding those pages.

Q. With respect to the first entry on the top of plaintiffs' exhibit 13 for identification, I note that the grove is denoted "Chandler."

A. Yes.

Q. Do you know the acreage included in that grove?

A. No, I do not. Chandler has several groves. I don't know which grove this came from.

Q. Do you know how many trees there were in the grove from which that fruit was a sample?

A. No.

Q. Turning to the sixth item on the first page of plaintiffs' exhibit 13, denoted "English" grove,—do you know how many acres are in that grove?

A. No.

[fol. 112] Q. Do you know the number of trees per acre of the English grove?

A. Not specifically, but I know the general planting scheme around through the area.

Q. In that area?

A. Yes, I would say I know it approximately.

Q. But you could not at this time give a correct figure as to the number of trees?

A. No.

Q. Dr. Harkness, as to the English grove, do you know whether the five samples which are shown there were selected at random from the grove?

A. All I know is that we gave directions to all of these people who were in the habit of bringing samples in to select them at random. I have no personal knowledge, however, that they did so.

Q. Do you know what relation these five samples had to the total number of trees in the English orchard?

A. Since I don't know the size of the grove, I couldn't give you that answer.

Q. Doctor, are you acquainted with the Latin-square method of sampling?

A. I am vaguely familiar with it. I never used it myself.

Q. I take it that you are familar that the Latin-square system of dividing the area of an orchard into small [fol. 113] squares?

A. Yes.

Q. Did you give instructions to Mr. English or to the person responsible there to divide the orchard by the Latin-square method or any other method to insure that the samples selected would be at random?

A. No.

Q. Do you know whether that was done, of your own knowledge?

A. I think it is safe to say that I don't know.

Q. Did you give any instructions with regard to the size of the samples that Mr. English should bring in?

A. Yes.

Q. What were those instructions?

A. The instructions in general that we always gave them was that there should be at least five fruit.

Q. Would that instruction as to the five fruit apply regardless of the size of the orchard from which the samples were taken?

A. Yes.

Q. Do you have any knowledge as to whether these samples could be considered orchard-run fruit or whether they were selected fruit on the basis of quality?

A. I don't know.

Q. Of your own knowledge, with respect to the English [fol. 114] grove, do you know whether enough samples were taken to account for variations between trees in the grove?

A. No.

Q. Did you give any instructions that such a factor should be taken into account in selecting the number of fruit and the selection of the trees from which the fruit was to be taken?

A. The only instructions we gave was that there should be at least five fruit and that the fruit should be selected at random.

Q. Do you have any personal knowledge with respect to the five samples which appear to have come from the English grove, as noted on plaintiffs' exhibit 13, as to the actual date the samples were picked?

A. The only knowledge we had was that we would take the word of the person who brought the fruit in to the effect that it was picked on the date he said it was.

Q. Is it true that your answer would be the same as to all of the samples and all of the groves listed on plaintiffs' exhibit 13, if I asked you the same question with regard to your personal knowledge as to the picking date, the source of picking, the size of the grove and the number of trees per acre?

A. In most cases, yes.

Q. Would it be fair to say that it would be true in at least ninety-five percent of the cases?

A. I believe so.

[fol. 115] Q. Isn't it true for your purposes that these factors that I have described, such as the sufficiency of the sample, whether it was picked at random, or the grove from which picked,—would be immaterial for the purposes for which you were making the tests?

A. The only purpose we were making the tests for was to give the person who brought the fruit in an indication of the oil content of the fruit, and that information did not personally apply to us because we were not going to use the data for ourselves.

Q. Then insofar as your tests were concerned, the tests showed only the oil content of these five fruit when measured according to your techniques?

A. Yes.

Q. With respect to the English samples, which appear to be five in number and which appear on plaintiffs' exhibit 13 for identification, do you have any personal knowledge as to how long the fruit was retained by Mr. English or his employees prior to the time it was given to you or someone at the laboratory?

A. No.

Q. Would your answer be the same if I asked the same question regarding all of the rest of the samples and groves which are listed on the several pages of plaintiffs' exhibit 13 for identification?

A. It would be true in most cases.

Q. If I asked the same question of you regarding your [fol. 116] personal knowledge of the picking date and the conditions under which the samples were selected, the size of the orchard and the length of time the grower retained the samples after picking before delivering to your laboratory, would your answer be the same as to the tests as indicated on plaintiffs' exhibit 12 for identification?

A. Yes.

Q. Is it true, Dr. Harkness, that your research project on maturity ended in 1954?

A. No. Insofar as oil content goes, it ended in either the end of 1954 or January of 1955.

Q. At the latest it ended in February of 1955?

A. As far as oil content goes. I did some other work on maturity on another angle the next season.

Q. That would be perhaps on density?

A. No; it was on respiration work.

Q. Subsequent to February, 1955 the oil tests were made at the request of the various members of the industry who would send in samples to you?

A. Yes.

Q. And these oil tests were made as general information to the industry rather than as a part of a specific project at the Experiment Station?

A. Yes.

Q. With respect to the fruit which you sampled as a part [fol. 117] of your research project in 1954, Dr. Harkness, did you personally go out and supervise the picking of the fruit in groves 5 and 9 at the Experiment Station?

A. Yes, I did. As a matter of fact, I picked it myself in most cases.

Q. So as to those tests then you would have personal knowledge from the time of picking clear through the testing?

A. Yes.

Q. As a part of the 1954 research project did you request

the industry or members thereof to furnish you with avocado fruit?

A. I believe so. I did in two or three seasons, and I believe 1954 was one of them.

Q. As to the samples which did not come from the Experiment Station groves, did you have any personal knowledge as to the manner in which the samples were selected?

A. Yes. I went to the groves and picked them myself.

Q. Then so far as the research project is concerned, you had personal knowledge as to the selection of the samples and the following of the samples through the laboratory where the tests were made of the samples?

A. Yes.

Q. Dr. Harkness, I show you plaintiffs' exhibit 12 for identification and ask you to look at the top line on page one and state if you can recall now whether you personally selected the five samples from the Piowaty grove?

[fol. 118] A. I don't remember selecting them.

Q. Is it possible that in the alternative you could have personally selected them or is it possible that Mr. Piowaty or his representatives may have selected them?

A. In all probability they picked them because it was five fruit, whereas if I had selected them for research work, I would have picked ten.

Q. Is it true that on page four of plaintiffs' exhibit 12 for identification that if none of the size samples shown were "ten",—would that indicate that you personally selected none of those samples?

A. That is right.

Q. Then it would also follow, would it not, Dr. Harkness, that none of the samples tested, as shown on page four of plaintiffs' exhibit 12 for identification, would appear in the results of your research project?

A. That is probably correct.

Q. Now, Dr. Harkness, I show you the first page of plaintiffs' exhibit 13 for identification and ask if you presently remember whether you personally selected the samples shown as coming from any of the groves on that page?

A. I don't remember personally selecting them at all.

Q. On page one of plaintiffs' exhibit 13 you indicate ten

samples from Kinard's grove. Is it possible that you personally selected that sample in the orchard?

[fol. 119] A. No, I never took any samples from Kinard's grove.

Q. There is indicated on page one of plaintiffs' exhibit 13 for identification five samples from the McMillan grove and eleven samples of Booth 7s from "Blank" grove. Is it probable or improbable that you personally selected those samples?

A. It is improbable.

Q. It is improbable that you personally selected any of the samples shown on page one of plaintiffs' exhibit 13 for identification?

A. Yes.

Q. Is it not also true that the results of the oil tests from samples shown on the first page of plaintiffs' exhibit 13 for identification were not shown in the results of your research project during 1954-55?

A. Yes.

Q. Now, Dr. Harkness, I show you page 78 of your book number 8, and ask you if you can identify for the record the approximate dates when the tests on that page were taken?

A. There were two on October 6, 1957, two on October 8th and several on October 16th, and so on.

Q. And what is the latest date shown there?

A. The latest date on this page is November 1st.

Q. With respect to the sample tests as shown on page 78 of your book which has been marked number 8, do you have any personal knowledge as to the conditions under which [fol. 120] that fruit was picked in the orchard?

A. No; it was brought to the laboratory for testing.

Q. Then is it true that as to the samples shown on that page, Dr. Harkness, that the only knowledge you would have would be knowledge given to you or your associates at the time of the delivery of the fruit to the laboratory?

A. Yes.

Q. With regard to the fruit shown on page 78 of your book 8 was the diameter of that fruit measured?

A. No, but it was weighed.

Q. And what terms of weight were used?

A. We used the composite sample, weighing the composite sample.

Q. At the time of weighing was the weight in grams translated into ounces?

A. No.

Q. During the tests made at the request of members of the industry did you ever have occasion to translate the weight shown in grams to weight shown in ounces?

A. Occasionally.

Q. For what purpose did you want to translate it into ounces?

A. So that the growers would know what the size was in ounces.

Q. Then the weight was translated for the convenience of [fol. 121] the growers and the packers?

A. Yes.

Q. With respect to the fruit which is represented by the entries on page 78 of your book, do you recall whether any of that fruit was covered by a Federal-State Inspection Certificate?

A. No, not when it was brought to us, that is, insofar as I know.

Q. Then so far as you know it had never been inspected?

A. That is right.

Q. Dr. Harkness, with respect to the fruit which is represented by the entries on page 78, what source of information did you rely upon in labeling or identifying the varieties of that fruit?

A. In most cases we could recognize the varieties ourselves.

Q. Would that be true of the principal varieties?

A. Yes.

Q. Would it be true of some of the lesser well known varieties in Florida?

A. There are some varieties that we at the Experiment Station may not be able to identify by mere inspection.

Q. Doctor, for example, would you yourself or people at your station be able to identify a Booth 1 variety from a Booth 3 variety?

A. Yes.

Q. Doctor, I wish to show you a copy of an avocado

[fol. 122] shipping schedule, of which I am somewhat ignorant. Perhaps you could list some varieties here which are not too well known and which perhaps yourself and members of the Experiment Station could not readily identify?

A. I do not see any point in doing that. I prefer to tell you the ones that I could identify.

Q. Doctor, as a favor to me, will you please describe the varieties which you and your staff would have difficulty in distinguishing from one another?

A. I can pick a few out here; for instance, the Nadir, the Nirody, the Vaca, Avon, Blair, Booth 10s, Booth 11s, Ajax, Sherman, Dunedin, Byars #1—I think we would have some difficulty with those varieties as to indentification.

Q. Isn't it true also that perhaps some of the experienced men in the industry, should we say, who deal with these varieties every day, Dr. Harkness, would have no difficulty in distinguishing these varieties?

A. Possibly; I don't know.

Q. As to the varieties you have just named, Dr. Harkness, upon what source of information did you rely in making the entries in your books 7 and 8?

A. That probably never came up, because these varieties were never brought in to my knowledge.

Q. Is it true that subsequent to January or February of 1955 that you would not have personally made the tests [fol. 123] which are reflected in books 7 and 8 and in the mimeograph sheets?

A. That is correct.

Q. Would you have been personally present in the laboratory room when the person on your staff made the tests in all cases?

A. Not in all cases, but in some cases I would have been present.

Q. During the period of time from January of 1955 until December 10th, which is the latest date shown on plaintiffs' exhibit 12 for identification, what would be the total number of workers in your laboratory who would have made these tests acting under your supervision?

A. Two.

Q. Who would those persons have been?

A. Mrs. McKee and Mrs. Kelp.

Q. As to the tests made by either of these two ladies, which were not made in your presence, how would you know as to whether or not their technique was perfect or whether they made errors?

A. I know that they were trained to run the tests, and I know that they knew the technique. I don't know that they applied the technique or not, because I wasn't there at all times.

Q. You presumed that they followed the correct technique?

A. Yes.

Q. However in those occasions where you didn't observe them, you couldn't personally warrant that they did follow [fol. 124] the proper technique?

A. No.

Q. Is it possible that you personally observed them make five percent of the tests covered by plaintiffs' exhibits 12 and 13 for identification?

A. Yes, I would say that I did.

Q. What would be the maximum percentage of the tests that you personally observed?

A. I would hesitate to estimate that.

Q. Perhaps ten percent?

A. I don't know; possibly that is correct.

Q. But certainly less than twenty-five percent; is that correct?

A. I am not sure.

Q. As a matter of fact, you would have no purpose in standing over their shoulders to see them conduct the tests, would you?

A. I know that they are capable workers, so that wouldn't be necessary.

Q. Doctor, I show you an unidentified series of papers marked at the top "1955 Progress Report", and ask you if you can state for the record who typed these pages?

A. You say "unidentified". The first page seems to be page number two. Page one for some reason is missing. The heading is "Annual Progress Report for the Year 1955." Apparently the stenographer didn't put her initials [fol. 125] on this progress report, so I don't know.

Q. Then you have no personal knowledge as to who typed that report?

A. No.

Q. Is it true, Dr. Harkness, that this report would have been typed from some kind of rough notes made in the laboratory?

A. They were not too rough; they were copied out very carefully.

Q. Do you have any personal knowledge as to whether this typewritten report is a true and correct reproduction of the original handwritten notes?

A. Yes, because I proof read these.

Q. Doctor, I show you page 126 of your book designated number 7, and ask you about item number twelve thereon. Does item number twelve reflect the palatability or taste of the fruit covered by that entry?

A. Apparently it does.

Q. You say apparently. Is that your handwriting there?

A. Yes.

Q. Then at this moment you don't recall the exact circumstances underlying that entry; is that correct?

A. I know that at that time I was running some tests to see how the fruit ripened when picked. My notes are not too full here, but it is evident that the fruit was picked [fol. 126] on September 29th, and the oil content test was run on—oh, I remember now. I picked a lot of fruit on September 29th and ran several oil content determinations on that same day, and then I ran a couple more oil content tests later, a couple on October 10th, on the same fruit; some tests were run on October 7th and some on October 10th. In the period from October 7th to October 10th the fruit became ripe and was tasted at that time.

Q. Who did the tasting?

A. I did myself. I don't remember whether anybody else did or not.

Q. What criteria did you use for palatability?

A. Just my own "feeling".

Q. Do you have any personal attitude or feeling towards avocados which indicates to you when you like avocados and when you don't like avocados?

A. Yes, I do. As I stated before, any investigation of that kind should require a panel test.

Q. Is it true that other persons in other parts of the United States might have different tastes for avocados?

A. Yes.

Q. Directing your attention back to item twelve on page 126 of your book designated book number 7, did you make an oil test on the precise sample which you tasted?

A. No.

Q. Then is it true that you made oil tests on fruit picked [fol. 127] at the same time as the fruit that you tasted?

A. Yes.

Q. Directing your attention to your results of the 1954-55 research project, did these tests show that for any given individual variety of fruit which you tested that the oil content increased as the season progressed?

A. Yes, that was the general result, the general indication that we found.

Q. To the best of your knowledge, Dr. Harkness, at what point of the season in terms of months would the Lula variety, considering a ten-fruit sample, average an eight percent oil content? In your opinion if the fruit had been picked in December and ten samples taken from it of the Booth 8 variety,—would those samples have averaged in excess of eight percent oil content?

A. Many of them would, but not all.

Q. The Booth 8 variety, as in the case of all varieties, has an oil variation?

A. Yes.

Q. And is it true, Dr. Harkness, that variations from the same orchard might run as low as three percent?

A. Yes.

Q. Would you say that it would run higher than three percent?

A. I don't know. In special cases it might, but not usually.

[fol. 128] Q. Would you say that it is a satisfactory fruit if the variation is within a range of three percent?

A. In a given grove, yes

Q. Were any tests made of the same size fruit in any

variety, whether Lula, Booth 8s or other varieties taken from different groves?

A. Yes.

Q. What was the variation of oil content as between samples of the same size picked under these circumstances?

A. This data here shows a variation up to thirty-six percent.

Q. What was the variation in the majority of the cases, Dr. Harkness?

A. I don't know. I couldn't say what the average would be.

Q. Would the average be somewhere between zero and six percent?

A. Since I have not seen them more than six percent oil content, that is probably correct.

Q. Using a variation of six percent, is it true that that would mean a three percent variation below or above a certain mean line?

A. Yes.

Q. For instance, if the range of variation was six percent, and that median line was eight percent, then it would be three percent above and below eight percent?

[fol. 129] A. Yes.

Mr. Fourt: Mr. Ferguson, I have a considerable body of cross examination yet, so I would suggest that we adjourn for lunch.

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AFTERNOON SESSION

January 22, 1958, 1:00 P.M.

Appearances: Same as heretofore noted.

Thereupon: DR. ROY W. HARKNESS resumed the stand and was examined and testified further as follows:

Cross examination (resumed).

By Mr. Fourt:

Q. Dr. Harkness, in your testimony this morning you used the word "maturity" and the word "palatability".

In your testimony this morning did you mean that when the avocado was mature, that it is also at a stage where it will be palatable to the consumer?

A. Not until it has been given an opportunity to ripen.

Q. When you used the word "matured", meaning the time when the fruit should be picked, did you mean after a normal seasoning period that the fruit had reached a degree of palatability satisfactory to the consumer?

A. That is right.

Q. In your testimony this morning when you referred to palatability, were you primarily relying on your own [fol. 130] sense of palatability?

A. I don't understand that question.

Mr. Ferguson: Neither do I.

By Mr. Fourt:

Q. Well, Dr. Harkness, when you referred this morning to "matured" fruit, you qualified it by saying fruit that is acceptable to taste. Were you referring to fruit that you found had a good flavor?

A. Not at that time. I was referring to fruits that were satisfactory to consumers eating them throughout the country.

Q. Referring to your 1954-55 research project, were the palatability tests that were made at that time made by yourself?

A. I am not entirely sure of this, but I believe I am right in saying that during that period Dr. Harding was running palatability tests in Orlando, so we did nothing at Homestead except perhaps myself, and possibly a couple others, may have taken some incidental supplementary tests, but on the overall we depended on Dr. Harding's tests as to palatability.

Q. Insofar as books designated 7 and 8, where palatability tests are entered, were they limited to tests that you yourself made?

A. Either myself or my associates. I don't remember for sure just how many others I had working with me.

Q. On the occasion when your associates made the

palatability tests, did you yourself join them in the tests?

A. Yes.

[fol. 131] Q. I refer you to seven typewritten sheets which are headed "1955 Progress Report", and ask you if these typewritten sheets refer to your 1954-55 research project?

A. They apply to it. The data was obtained previous to that, as you can tell from the dates indicated there. This is a tabulation of old data that was in the books but which had not been previously tabulated in typewritten form.

Q. Then these seven pages do not constitute findings on the research project; is that correct?

A. They are findings on the research project, but they were not obtained in 1954.

Q. Do you recall at approximately what time this compilation was made?

A. Some time, I believe, before July 1st, and certainly before August 1st. I know that the progress reports are due in either July or August of each year, so it was before that date in 1955. I believe it was probably three or four months prior to that.

Q. As of the date of this report, Dr. Harkness, this was a summary of the work of the previous year; is that correct?

A. It went back more than the previous year. It went back to 1952.

Q. It was a summary of your work from 1952 to 1955?

A. Not all of it. It was data that had not previously been reported.

[fol. 132] Q. Does the data recorded in books 7 and 8 that you discussed this morning, Dr. Harkness, cover the research project made in 1954-55?

A. Yes, it covers the research project from the first date in book 7.

Q. In addition to that it expressly covers reports of oil tests made at the request of members of the industry independently of your research project?

A. Yes.

Q. Directing your attention to your research project in 1954-55, is it true that you personally picked the samples from groves 5 and 9 for that research project?

A. Yes.

Q. And those were the only two groves from which you selected the samples?

A. No.

Q. What were the other groves?

A. The Kendall grove, the FLAG grove and the Brooks grove. I believe those were the only groves that we selected samples from regularly.

Q. So to the best of your knowledge now there would be six groves from which samples were furnished for your 1954-55 research project?

A. I think they are all I know of now.

Q. From your grove 5 and grove 9, and Mr. Kendall's [fol. 133] grove, FLAG grove, and the Brooks grove, making five?

A. Yes.

Q. Do those five groves complete the list?

A. As near as I can remember now. There may have been some incidental ones, but those five were the main ones.

Q. What is the size of grove 9?

A. Five acres, I believe.

Q. How many trees, approximately, on these five acres?

A. Between three hundred to three hundred fifty, I think.

Q. What is the size of grove 5?

A. Grove 5 requires an explanation. Grove 5 is an experimental grove at the Experiment Station. It is composed of ten acres, and it is composed of miscellaneous varieties. There are about seventy-five Lula trees, about seventy-five Booth 7 trees and about the same number of Booth 8 trees.

Q. Seventy-five Lulas, seventy-five Booth 7s and seventy-five Booth 8s?

A. That is correct. I notice that there is also some Booth 8s that came from another "block". Booth 8s came from block 8. The Booth 7s and the Lulas came from blocks 5 and 9.

Q. What was the principal varieties of avocados grown in block 9?

A. Lulas and Booth 7s.

Q. What is the size of Mr. Kendall's grove?

A. I am not entirely clear on that, but I think it is [fol. 134] probably thirty to forty acres. That is the one just east of the highway there at Princeton.

Mr. Kendall: It is twenty acres of avocados.

By Mr. Fourt:

Q. What would be your estimate as to the number of trees per acre in that tract?

A. I imagine about ninety to one hundred an acre.

Q. And what would be the varieties grown in that grove?

A. He has most everything there. Waldins, Lulas, Booth 8s and Booth 7s. Those were the ones I sampled mainly.

Q. And what is the size of the grove owned by FLAG?

A. That is a ten-acre grove, I believe. I believe it is a ten-acre grove.

Q. And can you estimate the number of trees per acre in the FLAG grove?

A. I would guess about eighty.

Q. And the varieties grown in that grove?

A. That is what we call an experimental grove, so they had a lot of varieties there. They had Lulas, Booth 8s, Hicksons, Halls, and possibly some others that I don't remember.

Q. What is the acreage of the grove owned by Mr. Brooks?

A. Probably about twenty acres.

Q. And the approximate number of trees per acre?

A. Probably close to one hundred.

Q. And the varieties grown there?

A. A lot of different varieties there, too; Lulas, Booth 8s, [fol. 135] Taylors and Waldins. There are other varieties grown there also, but I don't recall them now.

Q. To summarize, Dr. Harkness, is it true that grove 5 or block 5 at the Experiment Station is considered an experimental grove?

A. Yes.

Q. How about block 8 grove?

A. Block 8 is an experimental grove also.

Q. And the Kendall twenty-acre grove—is that experimental?

A. No, that is a commercial grove, and the FLAG is a commercial grove also, but I understand that it was planted for experimental purposes.

Q. What is the distinction between commercial and experimental groves?

A. There is no definite distinction except at the Experiment Station of course we have the trees there for various kinds of experiments, whereas in the other groves presumably the trees are there to make a profit on.

Q. For instance, the FLAG grove, with the several varieties you named,—is that typical of a ten-acre commercial grove in this area?

A. It has more varieties than the typical grove.

Q. Is it also true of the twenty-acre Brooks grove that you have more varieties than typical of this area?

[fol. 136] A. The Brooks grove is an old grove and it is quite typical of old groves to have a large number of varieties.

Q. Then it would not be typical of new groves in this area?

A. New groves usually do not have quite so many varieties, although it is not unusual for a new grove to have as many as five or six varieties.

Q. Is it true that a majority of the new groves will contain one or two varieties of avocados?

A. I don't know for sure, but I know there are many that contain more than that.

Q. Would it be for pollination purposes when they contain more than one variety?

A. Probably.

Q. Is grove 5 at the Experimental Station typical of a ten-acre grove in this area?

A. No.

Q. So far as your sampling is concerned, did you sample all of these groves on the same basis?

A. Yes.

Q. What was that date and how did you select your samples from those groves?

A. We picked out certai trees and designated them for sampling purposes, and then we sampled them at various times throughout the season. In the commercial groves we-

put tags on the trees so that the regular pickers would [fol. 137] leave the fruit on and we would come in and pick the fruit from those trees.

Q. I take it that these trees were selected deliberately by you in the grove?

A. Yes, they were typical trees, however.

Q. Were they selected at random or did you go into the groves and pick out the trees?

A. They were selected at random but of course we had to select a certain tree in order to—the purpose of tagging them was so that the picking crews would not pick the fruit off of them before we got through picking our samples during the season.

Q. How many trees did you select for sampling purposes on the Brooks twenty-acre tract?

A. I don't remember the exact number, but in general it was about three or four trees of each variety.

Q. And you refer to each variety as the Lula, the Booth 8, the Taylor and the Waldin?

A. Yes.

Q. And I think you included the Booth 7s, didn't you?

A. I got the Booth 7s from another Brooks grove. There are none in that particular grove. Brooks had Booth 7s in another grove.

Q. In selecting the trees from whch the samples should be taken in the Brooks tract did you select the trees through a mathematical formula or did you go into the groves and point out the trees?

[fol. 138] A. We went into the grove and pointed them out.

Q. In the Brooks grove, Dr. Harkness, of the four trees you selected, what would be the approximate number of fruit on the individual tree?

A. Oh, I don't know as I counted it, but I would say maybe two hundred to four hundred.

Q. It would be within a range of two hundred to four hundred? A. That is right. There may be some variation within that range, or some variation outside of that range.

Q. When you visited the orchard, would you take a sample from each of the four trees?

A. Yes.

Q. How many samples would you take off of each of the four trees?

A. It was never less than twenty, and sometimes it was more. I mean to say that the total sample was never less than twenty and sometimes it would be twice that many.

Q. In other words, the samples would vary from twenty to forty?

A. Yes.

Q. Was this figure of twenty to forty selected from the same four trees?

A. No, it wasn't the same number specifically.

Q. As to the individual tree, Dr. Harkness, in what por-
[fol. 139] tion of the tree did you select the fruit?

A. In all portions.

Q. Does that mean that you selected fruit from all portions of a tree?

A. We had a standard picker for picking fruit from the upper part of the tree, and of course we also picked the fruit from the ground.

Q. Is this standard picker a device which cuts the avocados off the tree?

A. Yes.

Q. It is a long pole with a cutter at the top?

A. Yes.

Q. And did you diagram the tree into quarters?

A. No.

Q. Then is it true that the standard in the picking of the samples would depend on the fact that you used the same general plan in selecting the fruit from a tree with respect to all of the groves?

A. We picked the fruit from different parts of the trees, but in no case were we able to find a particular variation of oil content by selecting fruit from different parts of a tree.

Q. Did you find different oil contents in the fruit picked at the same time from different portions of the tree?

A. As I stated previously, we found different oil content f.om different fruit on a tree, but those different oil con-
[fol. 140] tent were not correlated in any way so that we could tell the position the fruit was picked from the tree.

Q. What would be the range of oil content of fruit picked from one tree at one time of the same variety?

A. Usually within three percent.

Q. When fruit was picked from these trees in 1954-55, were different size fruit selected?

A. Sometimes.

Q. Did you have a uniform pattern of selecting different sizes of fruit or did you select just one size?

A. That would depend on what we were trying to show at the particular time. From these typewritten sheets, this typewritten data here, if you will look at them, you will notice that I was taking a uniform size on this page labeled "2". You will notice on this tabulation that ten fruit weighed 9.4 to 11.8 pounds—mostly between ten and eleven point five pounds. At other times we would go to a certain tree and take a sample of each fruit, and then a sample of small fruit, and then make a comparison. At one time we adopted the procedure of taking two samples of twenty fruit each at random, and then lining them up in two samples of ten fruit each, and determining the composite of the ten small fruit: in other words, making two determinations of two composites, ten fruit each.

Q. In your tests where you compared the oil content of the small fruit versus the oil content of the large fruit [fol. 141] picked at the same time, was the range in oil content in excess of three percent?

A. No.

Q. Was it within the range of three percent?

A. Yes.

Q. Was the range of oil content of fruit picked at the same time from the same tree and the same size within the range of three percent?

A. Yes.

Q. So that you could find no drastic major difference as between the different size fruit when picked at the same time?

A. There was a specific difference depending on size.

Q. What was that difference?

A. I have that on another sheet of paper here. I will have to look that up. Here is perhaps the best example of it. It is on page six of this typewritten sheet, which you

already have. In this column here you will find the Booth 8 size, and I have listed the size of the large fruit and the size of the small fruit, and the third column there is the difference in size between the large and the small. Then I have listed here the oil content for the large and the small, and as I summed it up I got an average difference of .46 percent oil, or a difference of 1.12 grams in size, the larger fruit being the higher.

Q. With respect to your 1954-55 studies, Dr. Harkness, during approximately what month of that year would the [fol. 142] Booth 8 variety have exceeded eight percent in oil content?

A. There are a few values here in excess of eight percent. In 1953, I think on December 1, I made one determination of the Booth 8 variety with 8.3 percent oil content, and another one with 9.3 percent oil content.

Q. Would it be reasonable to expect that the oil content of the Booth 8 variety would be increased one month later?

A. It would be reasonable to expect that, yes.

Q. In your 1954-55 project, during approximately what month of 1954 would the Booth 7 variety have reached an eight percent oil content?

A. I don't believe I determined when it would reach an eight percent value. No; I will take that back. I do have some values here of eight percent.

Q. What month?

A. The date is November 20th.

Q. And the oil content, Doctor?

A. It is on page seven here of this sheet. I have some values here from block 9 dated November 20th, averaging 9.2 percent.

Q. During the same research project, Dr. Harkness, during what month would the Taylor variety have reached an oil content of eight percent?

A. Approximately the same time, I would imagine.

Q. Approximately November?

[fol. 143] A. Yes, approximately November.

Q. In this research project did you find that there was an increase in oil content between the time that the same fruit was picked and the time that the fruit had softened, or whatever you call it.

A. We have some data to indicate that the oil content does increase after picking.

Q. Approximately what is the range of that increase?

A. Approximately one percent, except that we ordinarily did not determine the oil content after it was completely softened.

Q. At what point subsequent to the oil test and the time of picking, would you have made the test?

A. Probably as much as five or six days afterwards.

Q. Is it true that the period of five or six days after picking that the oil content of the avocado would increase approximately one percent?

A. On the average, but that is not completely consistent, because in some cases we got a lower value at that time, but on the average it increased.

Q. Is the cause of that increase limited to the amount of dehydration which occurred during those five or six days?

A. The increase was more than the change in percentage due to the loss of that amount of water.

Q. What factors, in addition to the factor of dehydration, would have caused the increase?

[fol. 144] A. I don't know. I am not a plant physiologist.

Q. The person who would work on that would be a plant physiologist?

A. A plant physiologist, a bio-chemist or something of that sort.

Q. Would it be reasonable to expect that both the Booth 7 and the Taylor varieties, which had an oil content in November of eight percent or more, would have had an increase in oil content even more if picked one month later than November?

A. Yes.

Q. Is it also true that the size would increase somewhat if left on the tree from November to December?

A. Yes.

Q. Have you discovered any consistency between the increase in weight and increase in oil content of avocados in this area?

A. The size increase and oil content increase do not increase at the same time, so you can't compare the two and say that they follow together.

Q. Is it true that palatability, oil content and weight will increase as the fruit remains on the tree during the growing season?

A. Yes.

Q. Have you been able to obtain any correlation as to whether these three things, palatability, oil content and weight have any relation to each other?

[fol. 145] A. That is what we have not been able to do satisfactorily.

Q. Dr. Harkness, will different cultural practices affect the same variety of fruit as between different orchards?

A. I don't know.

Q. With respect to size of fruit will cultural practices affect the fruit?

A. Yes.

Q. Are there other factors, of which you are aware, that will affect the size of the fruit?

A. Cultural practices and the weather.

Q. Is it true, Doctor, that cultural practices tend to cause the fruit to increase in size as compared to another orchard which has less satisfactory cultural practices, and that the fruit of the larger size will tend to have a lower oil content than fruit in other orchards of the same kind?

A. We have no correlation of that kind.

Q. Doctor, is it your opinion that the oil tests would be a reliable index of maturity and palatability for a single variety, such as the Lula variety?

A. It is my opinion, sir, that on account of the large variations that one finds in oil content, that we have not been able to correlate with palatability,—that on that account it would be a very unreliable test.

Q. Are you aware of any oil test comparisons with palatability which have been made in the scientific field?

[fol. 146] A. The only ones I am aware of are those that Dr. Harding made.

Q. Doctor, in your oil tests which appear to have been made from 1953 to date, what type of oil tests did you utilize?

A. It was essentially the method used in California. We modified the method slightly so as to avoid using the shaker machine which they use.

Q. Doctor, in making these tests will you describe for me the various steps that you utilize from the time the fruit enters your laboratory until you finally make your final rating?

A. The method is described in a paper which I wrote for the Florida State Horticultural Society. I don't know whether you have that here or not, but is described fully in that paper. Do you want me to give it to you in my own words now?

Q. I am afraid so, Doctor.

A. We weigh out a five-gram sample of the fruit. We obtain that sample by means of a core bar. We take a core of fruit from the skin to the side. We take enough of these cores to make more than five grams, and then we cut it so as to have an exact five-gram sample. We put that in a jar, a Waring blender, and add five millimeters of halowax oil and two hundred millimeters of water. We mix that up into a mixture, and we take that mixture and put it in a fifty-millimeter centrifuge tube, and as we centrifuge that material the oil settles to the bottom. We pour the water layer off the top, and the oil remains at the [fol. 147] bottom underneath the skim of the avocados. Then we take a stirring rod and poke a hole in the skim and pour the oil out from underneath it onto a wet glass, and from there we take that oil and run the refractometer index on it, and from that point on the procedure is exactly the same as utilized in California, except that we found it necessary to add 2/10ths of 1% of oil in order to agree with the results obtained with the shaker.

Q. Dr. Harkness, what in your opinion necessitates or causes the difference between the shaker and the other stuff you mentioned?

A. It could be the solution of the avocado oil in the water.

Q. Is the error the same as between soft and hard fruit?

A. We do not use that method for very soft fruit.

Q. Is that error greater when you use it on soft fruit?

A. I don't know, because it is impossible to make a determination by that method with very soft fruit. We still have the shaker machine to use in cases where we want to make a determination on the soft fruit.

Q. Would you describe this Waring blender?

A. It is an ordinary household mixer, along with a quart jar on a little motor placed on stand.

Q. Is the Waring blender a standard brand?

A. Yes.

Q. You mentioned something about heating the mixture.

[fol. 148] A. No, I did not.

Q. During any portion of this particular process is any of the mixture heated?

A. No.

Q. From the description you have just given me, Dr. Harkness, could another chemist, following this exact description, duplicate your results?

A. Yes.

Q. Would you describe your refractometer index?

A. It is a standard refractometer index. I believe it is called an Abbe.

Q. Is there any provision control temperature on that instrument?

A. Yes.

Q. What is that control?

A. It is a thermostatic control that controls the temperature approximately plus or minus 2/10ths of a degree Fahrenheit.

Q. What is the amount of the temperature setting when you use this refractometer index?

A. I believe it is thirty degrees.

Q. Would that be thirty degrees centigrade, Doctor?

A. Yes. It is somewhat higher than the temperature that is sometimes considered standard, the reason for that being that we wanted the temperature to be above the room temperature, so our calibration was made for that temperature in order that it would be consistent.

[fol. 149] Q. Doctor, directing your attention to this Abbe refractometer index, does that instrument you have in your laboratory have a standard index on it which was established for that machine by the factory?

A. Yes, I believe so.

Q. And what is that standard?

A. I don't know. I just haven't worked with it for the last several months.

Q. Based on your memory, Dr. Harkness, would that standard temperature be lower than thirty degrees?

A. Yes, I believe it would be twenty-five degrees.

Mr. Fourt: That is all.

By Mr. Norris:

Q. Dr. Harkness, I would like to ask a couple of questions on a couple of points which are not clear in my mind. When you bring the fruit in from the field do you run the oil test on all of the avocado samples?

A. Yes.

Q. And do you run palatability tests on the same fruit that you run the oil tests on?

A. As I said before, we ran many palatability tests, and very few of those that we did run it was on different fruit. We tried doing some on the same fruit—

Q. Generally speaking, it was your practice to run oil tests on different avocados than you ran the palatability tests on?

[fol. 150] A. Yes.

Q. Do I understand, Dr. Harkness, that your oil content tests were all run within two days after the picking date of the fruit?

A. We were trying to determine the oil content of the fruit as picked. That was true, but in a special investigations on the matter of ripening, we waited longer periods.

Q. Are those special tests so designated in your records?

A. Yes.

Q. How are they designated?

A. There is a footnote on page three of this typewritten sheet here, which I believe explains it all right. For example, I have duplicate determinations made for certain values, and the first value in all cases is the one that runs in one or two days of picking, and the later ones would run at a later time.

Q. Was it your testimony that the size of the avocado could be affected by the cultural practices in a particular grove?

A. Yes.

Q. Could the rate of maturity be so affected by cultural practices?

A. I don't know.

Q. Would it be possible for cultural practices to stimulate the growth of the avocado or in the development of the maturity of the avocado?

A. I don't know.

[fol. 151] Q. But you do have an opinion that normal cultural practices can affect size?

A. There is no doubt about that.

Q. Would you explain your basis for that opinion?

A. It is involved, but certainly if you apply more fertilizer and water you will get a greater growth of fruit. It is not entirely certain that you will get more fruit or larger fruit, but it does either directly or indirectly affect the size of the fruit somewhat.

Q. You also testified that there might be other factors which might influence the growth of avocados, such as weather; is that correct?

A. Weather is one thing, and of course cultural practices include most everything except weather, perhaps.

Q. Does the difference in weather from degree to degree materially affect the rate of growth of the avocados in this district?

A. Very largely.

Q. Is it possible that the rate of growth of the avocados is so easily affected by the various factors that the rate of growth may be different within a given district?

A. I don't know. I would expect that a weather difference in a given district would be an important factor in that respect.

Q. Do you hold a firm opinion on that, Dr. Harkness, or is that just speculative on your part?

[fol. 152] A. The question about weather conditions?

Q. Yes.

A. I would expect that the weather conditions in a given district would be pretty much the same. Of course a freeze would make a big difference. Aside from something like a freeze or a flood or something like that, the temperature variations probably would not make much difference in a given district.

Mr. Norris: I think that is all.

Redirect examination.

By Mr. Ferguson:

Q. Dr. Harkness, you stated on cross examination that the tests made at the Experiment Station in 1955, 1956 and 1957, upon application by growers and handlers, were not a part of research project number 675. Now, then, do these tests have any purpose so far as you and the University are concerned other than to render a public service?

A. Only insofar as they were supplementary to and in confirmation of our previously obtained research work.

Q. You have also stated that the tests considered as a part of research project 675 were concluded at the end of the year 1954. Now, I ask you were the conclusions stated by you at this hearing confirmed by tests made as a part of project 675?

A. Yes.

Q. You were also asked something about your tasting of avocados. For what purpose did you taste any of the avocados?

A. The purpose was to determine if they had reached a [fol. 153] satisfactory degree of maturity for that variety.

Q. Did you taste them to determine if you personally like the flavor of one variety rather than another?

A. No.

Q. Or to determine the state of ripening process?

A. No. They were allowed to ripen until they reached the condition that we thought was the best for that particular fruit.

Q. Then was it to ascertain whether it had attained the flavor appropriate to that variety?

Mr. Fourt: I object to the leading and suggestive question.

Mr. Ferguson: I think the witness has already answered that question. Maybe you are right in your objection.

By Mr. Ferguson:

Q. Did you compare the flavor of one variety with the flavor of another variety?

A. No. We tried to avoid that.

Q. There was a question put to you about a sample of ten Booth 8s tested in December of one of the years you were making these tests, and you were asked if the avocados would likely reach an eight percent oil content or more in the month of December. Did you in your answer give any consideration to marketability of the fruit when it attained an eight percent oil content?

A. No, I gave no consideration to that. As a matter of fact, sir, that fruit was already so matured that it probably would have been difficult to get it to a northern market in [fol. 154] time before it became overripe.

Q. Another question was asked you along the same line, that is, you were asked if the fruit were left on the tree another month or two within a growing season, would it increase the oil content of the fruit. You answered that question in the affirmative. Now, then, Dr. Harkness, if left on the tree after the growing season what is likely to happen to the fruit?

A. Well, it would probably fall to the ground.

Q. Does dehydration increase as time goes on?

A. Yes.

Q. And would it be greater at the end of two months than at the end of one month?

A. Yes, in some varieties it would be greater, yes.

Q. I direct your attention to a copy of the list of avocado varieties enumerated on plaintiffs' exhibit 9 for identification in this case. Look at that list and tell us of what general horticulture classification are the first eleven varieties included on that list?

A. The first eleven on this list are all West Indian varieties.

Q. And what are the principal characteristics of the West Indian avocados?

A. They have a thin skin and are smooth.

Q. What about size?

A. They have a tendency to be of large size.

[fol. 155] Q. And as to oil content?

Mr. Fourt: I object to the leading and suggestive question.

Mr. Ferguson: I am just trying to direct the attention of the witness to it.

The Witness: They do have a lower oil content.

By Mr. Ferguson:

Q. What is the comparative size of the Booth 8s as against the first eleven varieties named on that list?

A. It is smaller than most of them; in fact, I think it is probably smaller than all of them.

Q. Of what classification are most of the varieties on this list after the first eleven?

A. With the exception of possibly a half a dozen or so, most of them are probably hybrids.

Q. What varieties on this list are grown in the largest volume in Florida?

A. The Lula, Booth 8, Booth 7, Waldin, Booth 1, Hickson, Pollock, Hall, Choquette and Taylor. I am not sure that these are all in proper order, but those would include the major commercial varieties.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Dr. Harkness, in the course of your professional career have you had occasion to make a study of the marketing of avocados?

[fol. 156] A. No.

Q. Do you consider yourself as an expert in the field of marketing of Florida avocados?

A. No.

Mr. Fourt: No further questions.

And Further Deponent Saith Not.

Dr. Roy W. Harkness, Deponent.

[fol. 158] Thereupon: HAROLD E. KENDALL a witness, called on behalf of the Plaintiffs, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Ferguson:

Q. Will you state your name in full?
A. Harold E. Kendall.
Q. Where do you reside?
A. At Goulds, Florida.
Q. What is your business?
A. I am a grower and shipper of avocados.
Q. Where is your office located?
A. Located in Goulds, Florida.
Q. Do you have a packing plant there?
A. We have a packing plant located on the highway between Goulds and Princeton.
Q. Now, you say that—
A. I am referring to the South Florida Growers Association, of which I am president.
Q. Is that a corporation?
A. It is a corporation.
[fol. 159] Q. Of what state?
A. Florida.
Q. When was it organized?
A. I'd have to—

Mr. Fourt: Pardon me, Mr. Ferguson, before he answers that question, we should like to be supplied a copy of the document which he is using to refresh his memory.

Mr. Ferguson: I don't know if he is going to use any documents.

A. (Continuing) South Florida Growers Association was incorporated in April, 1953, April 29, 1953.

By Mr. Ferguson:

Q. Did it succeed some other business organization?
A. Yes, previously I operated under the trade style of Florida Growers Association from July, 1939, until April 30, 1953.

Q. Was that a corporation?

A. No.

Q. An individual business?

A. An individual business, Florida Growers Association.

Q. And of what does the business consist, that is, what are the operations of the business?

A. South Florida Growers Association consists of a packing house and surrounding property that has facilities for receiving, grading, and packing and cooling and shipping of avocados.

Q. Do you also handle other fruit?

[fol. 160] A. Yes, we handle limes and mangos.

Q. Does your company also engage in the cultivation of avocados?

A. South Florida Growers do that, engage in the cultivation. Independently I own some groves myself.

Q. What groves do you own and to what extent and where are they located?

A. All of the groves I own are in the area of Dade County, known as Redlands area, which is 20 miles south of Miami and these groves amount to 100—115 acres of producing avocados and about 30 or 40 of producing limes.

Q. Do you operate groves for others?

A. Yes, in connection with other activities in the area, we operate a number of other groves on a lease arrangement basis custom management and maintenance work for a number of other growers in the area, in the immediate area.

Q. What does that mean?

A. That means we do the management and maintenance of the groves. We do the maintenance work on them, the maintenance work in this case would be the operations, such as fertilizing, spraying, mowing and harvesting.

Q. How long have you engaged in the growing and handling of avocados in Florida?

Mr. Norris: I was wondering if Mr. Kendall was an individual or an official of the corporation.

[fol. 161] Mr. Ferguson: At this time I asked the witness about his own experience.

Mr. Norris: Some of the questions aren't clear to me with reference to his individual capacity.

Mr. Ferguson: You can't make it clear now. You can do it later on cross-examination.

By Mr. Ferguson:

Q. Have you the present question?

A. As an individual I am interested in the growing and marketing of avocados and have been since July, 1939.

Q. Did you have any prior experience in the avocado industry?

A. Prior to that time I was with Calavo Growers of California for approximately 10 years, from December, 1929, until I came down here in July, 1939.

Q. In what capacity or employment?

A. Well, all the way from cooler clerk up to district manager, mostly in the sales department of Calavo Growers of California.

Q. Does Calavo have sales offices in places other than California?

A. Yes, I believe they have some 35 or 38 sales offices outside of California.

Q. Where did you work?

A. Well, I started out in Los Angeles, went to San Francisco, then to New York, then at the time, I paraphrase these remarks by saying at the time, I was with Calavo they were opening up sales offices around the country and [fol. 162] I was in the process of starting sales offices and I went to New York and Boston, Cleveland, Chicago, Philadelphia, Atlanta, in various capacities and in most cases in the opening of offices and turning them over to other personnel after the offices had been started.

Q. What schooling did you have, Mr. Kendall?

A. I went to the University of California, graduated in 1929.

Q. Did you receive a degree at that time?

A. Yes, a bachelor of science degree in agriculture. I went to Harvard Business School and graduated from there—Harvard School of Business in 1935. I had a leave of absence from Calavo in order to enter the Harvard Business School.

Q. Did you receive some degree there?

A. A Master of business administration.

Q. In your activity in the business, have you written articles on the subject, on the producing and marketing of Florida avocados?

A. There have been a few articles written, I think, one or two in California which were of an informative nature and there might have been one in the Florida Horticultural Society along the same vein.

Q. Will you state generally what has been the development of the avocado industry in Florida during these years in which you have been active in this industry?

A. Well, the avocado industry in Florida was a relatively [fol. 163] small industry during the years of 1935 to '38 and at that time the acreage was static. I believe it was around 2,000 acres, possibly a little less. Beginning with '39 or '40 or '41, along in there, acreage was planted and began to be very heavily planted along around about 1944 to 1950 and I believe the total acreage planted in Florida finally rose to around 11,000 acres. I have heard somewhere around approximately 11,000 acres of avocados planted in Florida.

These increased plantings are just now beginning to come in production. It takes eight to ten years for avocado trees to become, to approach maturity or at least any size and when we found that we were getting increasing supplies of avocados of different varieties, a number of factors in the industry decided they should set up a standard for maturity.

One of the ways of setting up a standard of maturity was to make a study and so forth and so that is when they set up the Avocado Administrative Committee and the Avocado Administrative Committee came into being about four or five years ago. One of the main purposes was to study maturity and attempt to set up standards of maturity. At the present time I believe the production of avocados in Florida is approaching around 600,000 bushels as compared to about 100,000 bushels about 10 years ago, depending on the weather and climatic conditions. Maybe we could increase it to from 800,000 to 1,000,000 bushels in the next three or four years.

[fol. 164] Q. In these recent years what varieties of avocado have become most important commercially?

A. In the last 10 years the Hybrid variety of avocado which have been developed over the past 20 or 25 years, have been planted rather extensively.

The Hybrid, which from a growing standpoint, seems to be well suited to Florida and principally the Hybrid especially the West Indian and Guatemalan varieties. These varieties are principally Booth 8, Booth 7 and Lula varieties.

Q. I direct your attention to the copy of the document identified as Plaintiffs' Exhibit 9 and particularly the first 11 varieties appearing on the list of varieties of avocados contained on this document. Now, what classifications are these 11 varieties, if you can state?

A. I believe most of those first 11 varieties would be classified as West Indian, avocados of the West Indian type.

Q. Were some of these 11 varieties grown in Florida in substantial volume? To make that more definite, let's say 10,000 bushels in one or both of the past two seasons?

A. Oh, yes. The Fuchs was one that was grown, the Waldin, Pollock and Simmonds amounted to—

Q. I notice you place the Pollock and Simmonds together.

A. Well, the Simmonds and the Pollock are classified together because the Simmonds is the seedling of the Pollock. Of course, then we have the Waldin which is one of [fol. 165] the major varieties which has been planted in some quantity during the past 10 years so it is quite a large variety. I believe the other ones would be in the classification of what we would call minor varieties.

Q. What about the Trapp?

A. The Trapp is a variety which was extensively planted many, many years ago, but hasn't been planted—I doubt if there has been any planted during the last year, but it is a very heavy producer some years.

Q. Did you ship to California say any of the first 11 varieties named in Plaintiffs' Exhibit 9?

A. I don't know, I believe I haven't shipped any of these first 11 varieties to California—no, I can't say that I have.

Q. Number 12 in the list is Booth 8, is it not?

A. Yes.

Q. Have you shipped Booth 8 to California?

A. No, I haven't been able to get any of the Booth 8 to run a high enough test to warrant taking a chance shipping them to California.

Q. What kind of a test?

A. Before we make any shipments to California—

Q. Just answer the question.

A. Oil content test.

Q. Oil content test?

A. Yes.

Q. You were, of course, familiar from your experience [fol. 166] with the predominant varieties of avocado grown in California?

Mr. Fourt: I will object to the question as being leading and suggestive.

Mr. Ferguson: I don't think it is leading or suggestive.

Mr. Fourt: You go ahead and answer.

A. Do I know of the major ones grown in California, yes.

By Mr. Ferguson:

Q. Well, you are familiar with the varieties?

A. Yes.

Q. Familiar with the varieties that—

Mr. Fourt: I object to the question as being leading and suggestive and ask it be stricken on that ground.

By Mr. Ferguson:

Q. What is the size and appearance of the Booth 8?

A. The Booth 8 is one of our varieties that is characterized as heavy among a large number of fruits of a smaller size. I would say that our Booth 8 runs from, on the average, from 10 to 16 ounces in size; very heavy from 12 to 14 ounces at the height of the shipping season. And this fruit is of an oval shape which is somewhat or much like the Choquette in general size and appearance.

Q. Can you tell us whether or not the production of Booth 8s has been increasing or decreasing in recent years?

A. The production of Booth 8s has been increasing over the past 10 years. I think it will continue to increase be-
[fol. 167] cause as the groves come into production the Booth 8s are a heavy producer and the newer groves have been planted heavily.

Q. What variety or varieties have you made most of the shipments of avocado to California?

A. Principally the Lula variety.

Q. Looking over the list in Plaintiffs' Exhibit 9, do you recall a shipment of any of the other varieties named in that list?

A. We tried Booth 7 variety and I think we tried some Hickson. I think the Hickson went through without too much difficulty, but the Booth 7, I believe, we had trouble with. They didn't meet the oil content required when they reached California.

Q. You have named the Lula and the Hickson and Booth 7.

A. Yes, those are the—

Q. Have you from time to time procured tests of oil content of avocado from the Subtropical Experiment Station of the University of Florida in Homestead?

A. Yes, we have.

Q. Would you look at the copy of Plaintiffs' Exhibit 13, for identification, and tell us to the best of your recollection if you applied for the tests set forth in that exhibit?

A. Yes, I believe we did.

Q. To the best of your recollection were the results of these tests reported to you personally?

A. Yes.

Q. For what purpose did you procure these oil tests?

[fol. 168] A. We were trying to find out whether any of our avocados would test 8% oil content with the thought that we then would be able to ship them to the California markets for sale within the State of California.

Q. In any instance, Mr. Kendall, did you procure an oil test for any other purpose?

A. No, I don't think so, no.

Q. If you will look at Plaintiffs' Exhibit 13, for identification, does it indicate that you obtained oil tests in October and November, 1954, on Hickson, Lula, Camp, Vaca, Booth 7, Booth 8, Taylor, and Booth 3 avocados?

A. Yes.

Q. Did you ship avocados of any of these varieties to California in 1954-55 season?

A. We shipped the Lula and Booth 7. That was the year we tried the Booth 7 out there, but it was principally Lula.

Q. Do you recall about when, what time of the year?

A. To California?

Q. Yes.

A. I can't—if I can refresh my memory from some notes—

Mr. Fourt: Mr. Ferguson, may I see the notes prior to the witness answering on this occasion?

Mr. Ferguson: He will have to pick them out.

Mr. Fourt: Yes, he can look at the documents but we would like to see them and then he can answer the question.

[fol. 169] Mr. Ferguson: We will do it that way.

By Mr. Ferguson:

Q. Is that (indicating) the document you are going to look at?

A. Yes, to refresh my memory.

Q. Any other pages you are going to look at?

A. No.

(Defendants' attorney examining paper.)

Mr. Fourt: Mr. Ferguson, we would like to mark this for identification, or do you desire to?

Mr. Ferguson: You are a little out of order. It won't run away.

By Mr. Ferguson:

Q. Is your memory now refreshed, Mr. Kendall?

A. It appears we started shipment to California in 1954 on October 29, 1954.

Q. And when, over what period of time?

A. Through November 19, 1954.

Q. Would it be the end of October?

A. About a three-week period.

Q. Had you been marketing these varieties, I believe you named the Lulas and Booth 7, previous in the season in other states?

A. Oh, yes. We had been marketing them right along under our schedule shipping date.

Q. Had you disposed of part of your supply of these varieties—

[fol. 170] Mr. Fourt: I will object to the question as being leading and suggestive.

A. We had shipped a considerable quantity of these varieties prior to the time we made our first shipment to California.

By Mr. Ferguson:

Q. Now, going to the year 1955, and again looking at Plaintiffs' Exhibit 13 for identification, what varieties, if any, did you procure oil tests on in that season?

A. '55, I think we procured oil tests of the Camp variety.

Q. Let's see it.

(Examining document.)

Q. Here is the page (indicating).

A. That is the Camp variety only and I meant the Booth 3 and Lula varieties. We got them at the Camp Grove.

Q. "Camp" is the name of a grove?

A. "Camp" is the name of a grove.

Q. When did you procure those tests?

A. Those tests were started on November 19 and carried—November 14 and carried over a period of 9 days through November 23.

Q. Did you make a shipment of avocados of these varieties to California in 1955?

A. We made a shipment of Lulas,—a shipment of Lulas in 1955.

Q. When?

A. Beginning November 15.

[fol. 171] Q. At what stage was this in your marketing of Lula avocados in the 1955-56 season?

A. Well, we started moving Lulas of 18 ounce minimum back in October—October 3, and then on October 17 we

were moving, marketing, Lulas of 16 ounce minimum weight, and on October 31 we started marketing Lulas of 14 ounces and on November 14 we were able to market Lulas of 11 ounce minimum.

Q. Can you state to what extent you had marketed Lulas prior to November 15, 1955?

A. I know we had moved quite a few of them. I couldn't say what percentage we had moved prior to that time.

Q. In 1956-57 season, did you procure some oil tests?

A. We started with the oil tests or asking the experimental station on November 9. I think, however, it might be fair to state that many times we didn't ask for the oil tests on our own account, because we would possibly ask Dr. Harkness' office who would be doing the oil tests and ask them how the tests were coming until they got up above the 8% on any variety. We didn't continuously take samples ourselves. We only took them when we thought there was a possibility, a chance, of getting a particular variety or particular grove that would test 8%; then, at that time we would start taking tests. In other words, these tests here would be made, or taken, of a grove if for some reason or another we thought they might possibly test 8%.

Q. Those started, you say, November 7?

[fol. 172] A. November 9, according to this table here (indicating).

Q. Was there a number of these tests made on various dates in November?

A. There were a number of tests made from November 9 through the 28th primarily of Lula.

Q. Any later ones?

A. Yes, the Lula even went clear through December.

Q. That was the Lula and other varieties?

A. The other varieties, Booth 1s, Booth 3, Taylor, Booth 4—clear way in December and still weren't passing, still weren't going 8%, let's say.

Q. Any others?

A. Hickson—did I mention Taylor, Booth 7b, Collinson and Herman. All of those varieties, especially in these earlier years, we tried to find out when, if ever, they would test 8%.

We would take samples many times out to the experimental station to ask them to run it.

Q. Did you make shipments to California in this season of any of these varieties of avocados you have just mentioned?

A. No, we only shipped the Lula variety, because—that is all we shipped, I believe.

Q. Can you tell us when?

A. If I can refer to that (indicating) piece of paper I had here a minute ago. That had the same shipping information which indicated what we shipped to California, [fol. 173] avocados to California, November 15, 1955 and—

Q. Now, we are in '56-57?

A. '56-57, I am sorry. If I can refresh—

Q. Is there something that you can refresh your recollection with there? If so, you may look at it after Mr. Fourt looks at it. I mean, before you answer.

A. Let me look and see if I can find anything to indicate '56-57.

Q. Is that the paper you are going to look at?

A. Yes.

Mr. Ferguson: All right. I will hand it to Mr. Fourt so he may examine it.

(Examining paper.)

By Mr. Ferguson:

Q. Have you in mind the question?

A. Could I have it repeated, if you would, please?

(Thereupon, the preceding question was read.)

A. (Continuing) We started making shipments to California on November 16, 1956, and we shipped that year up through January 17, 1957.

Q. Taking the earliest date, November 16, how long was that after the commencement of your marketing of Lulas in 1956-57 season?

A. Well, 1956-57, we started marketing Lulas of 18 ounces or more on October 8. On October 22 we started [fol. 174] marketing Lulas 16 ounces or more and on No-

vember 5 Lulas of 14 ounces minimum were marketed. On December 3 Lulas of 11 ounces minimum.

Q. What is the size or weight of the Lulas that you usually market?

A. On these shipments that we usually make at that time of the year the fruit will average a package, that we package, 12 to the flat, 14, 16 and 18 and the 12 will run approximately 20 to 22 ounces; 16 will run around 14 to 16 ounces; 18 will run about 13 to 14 ounces.

Q. You ship the 14's?

A. 14 would run about 16 to 18 ounces, yes.

Q. Going to the 1957-58 season, did you obtain oil tests in that season?

A. Yes, our first test on the Lula was obtained October 31, 1957, and they continued on through the middle part of November, primarily on the Lula, mostly Lulas.

Q. Did you also obtain tests on the other varieties?

A. We obtained one test of Booth 7, one test of Booth 3 and we made—we had one test made that (indicating) shows three here, but it was one sample of Booth 8 on November 18. That was one sample which we presented them. It shows here (indicating) as three tests, however.

Q. In that season did you make shipments of avocados to California?

A. Yes, we only shipped the Lula variety.

[fol. 175] Q. Beginning when?

A. Beginning November 7 and we haven't finished the season, of course.

Q. Had you been marketing Lulas in this season prior to November 7?

A. Yes, Lulas were marketed at 18 ounce minimum on October 7; 16 ounce minimum on October 21; 14 ounce minimum on November 4 and 11 ounce minimum on November 18.

Q. Were some of your shipments of avocados to California barred from sale in that state because of alleged insufficient oil content?

Mr. Fourt: I will object to the question as being leading and suggestive.

Mr. Ferguson: I will break up the question.

By Mr. Ferguson:

Q. Were some of your shipments of avocados to California barred from sale in that state?

A. Yes. Over each of the four years we had shipments which were rejected when they were inspected in California.

Q. Have you prepared a summarized statement of these rejected shipments?

A. Yes, I can give you a summary of these statements.

Mr. Ferguson: Will the Reporter please mark these three pages entitled, "Avocado Shipments Barred from Sale in California, South Florida Growers Association, Inc." as Plaintiffs' Exhibit 17 for identification.

[fol. 176] Mr. Ferguson: I will ask you a few more questions on it.

Mr. Fourt: May I read it?

Mr. Ferguson: Okay.

(Examining document.)

By Mr. Ferguson:

Q. Mr. Kendall, have you with you at this hearing the complete file of each of the seven transactions described in Plaintiffs' Exhibit 17, for identification?

A. Yes, I have a folder giving all the information.

Q. Have you the invoices?

A. I have the invoices.

Q. And the bills of lading?

A. Yes, on each one of the individual shipments.

Q. You have the account record of the customer or consignee?

A. Yes.

Q. Do you have the inspection certificate, if any inspections were made by the Inspection Service of the State of Florida?

A. We have the inspection certificate on each one of these.

Q. Did you get more than one copy of the inspection certificate?

A. No, we get what is known as the red copy of the truck inspection certificate which is entitled, "The Red Copy".

Q. You have the copy of the certificate marked here, marked Plaintiffs' Exhibit 3 for identification, is that what you call the yellow?

[fol. 177] A. That is the yellow copy, I don't know who gets that, I guess the truck driver. Each handler gets a copy of that inspection certificate at the time his truck is loaded.

Q. Do you furnish a copy to the truck driver?

A. We don't furnish them; the Inspection Division furnishes them. We are furnished only with our copy.

Q. Do you know whether or not that goes with the truck?

A. It is supposed to go with the truck and be always with the truck's papers all along the line. That is, the yellow copy.

Q. Yes. Are there inspection stations somewhere near the border of the state?

A. Yes, there are inspection stations on the south entrance to California at Yuma, California, somewhere along there.

Q. I am not talking about California. I am talking about Florida.

A. Yes, there is what we call Road Guard Stations at every exit from the State of Florida across the whole peninsula. I would say it is almost impossible for a truck to get by one of the inspection stations without showing a bill of lading and certificate, as the case would be.

Q. By this certificate you mean the certificate of inspection?

A. Yes.

Q. Do you employ a selling agent in California?

A. My principal sales agent is Calavo in California. They [fol. 178] handle all my sales out there.

Q. Do you employ Calavo Growers in California in any other markets?

Mr. Fourt: I object to the question as being leading and suggestive.

A. Calavo Growers of California are my principal sales agents throughout the country. They are not exclusive, but they are my principal agents.

By Mr. Ferguson:

Q. Mr. Kendall, is the document now marked Plaintiffs' Exhibit 17, for identification, a true and correct summary of what appears in the books and records of your company regarding these seven shipments of avocados to California?

A. They are as exhibited, yes.

Mr. Ferguson: This document marked Plaintiffs' Exhibit 17, for identification, will be offered in evidence as Plaintiffs' Exhibit 17.

By Mr. Ferguson:

Q. From your experience in the marketing of avocados, can you tell us whether or not a chain store grocery organization would undertake a program of advertising and selling avocados of specified kind and specified price without certainty of receipt of the avocados in accordance with a predetermined delivery schedule?

Mr. Fourt: I will object to the question on the grounds that there has been no proper foundation laid and that the question is assuming facts which are not in evidence.

[fol. 179] Mr. Ferguson: Well, I do not think it is assuming anything except that he has experience in the marketing of avocados.

What other assumption is there?

Mr. Fourt: Well, we will have to argue this point before the Court.

Mr. Ferguson: Well, you have made an objection and it is up to you to state what it is. You say that we are assuming facts.

Go ahead.

The Witness: May I have the question repeated?

(Thereupon, the preceding question was read.)

A. (Continuing) No, the chain stores are rather unwieldy organizations. At the time in order to set up the promotion of a particular item they usually require 10 days to two weeks to plan their promotional activities. In making purchases of items like avocados, for example, from Florida

to California or to the northern markets, for example, chain stores in Chicago or New York or San Francisco, when they are going to pay for something they want to know they are going to receive it. Because, they have already set in motion and promotional space in the store and advertising and if the situation happens and did happen a number of times in our case, we got a truckload or two or three truckloads of fruit for a chain store and we set a delivery date we intended to put the fruit in the stores, that is within the next day or two, if that truckload [fol. 180] is rejected for one reason or another and it is not available to them, they immediately lose a great deal of interest in that particular item and become quite upset because it disturbs their whole marketing promotion at that particular time.

That has happened in a number of cases and it is particularly disturbing, because of the distances over which we operate and the factor, season, for marketing is relatively short.

Q. I failed to ask you, I am now referring to Plaintiffs' Exhibit 17 for identification, whether or not your file includes a report from your agent or consignee as to the rejections of all or part of the load, as the case may be, and the cause of the rejection?

A. We have what we call an "Arrival Report" which is sent along to the receiving office or consignee and usually that Arrival Report is filled out in great detail as to arrival and a place for remarks, if anything unusual, such as a rejection of a load or part of a load. All of those notations are made and many of the shipments that notations were made on show certain portions were rejected, because of oil content being below 8%.

Q. Is that the basis in each instance of the statement in this exhibit that certain portions of the loads were rejected upon test of oil content?

A. Yes.

Q. Are all of these avocados handled by your company marketed under Federal Marketing Order No. 69 and Fed-
[fol. 181] eral Marketing Agreement No. 121?

A. Yes, all of our avocados are under that regulation.

Q. How long has this been true?

A. Ever since the inception of the Avocado Administrative Committee, which was in 1954.

Q. When avocados shipped by you to California are rejected in that state, what happens to them?

A. We have to find some other home for them and usually we have to have them re-shipped to Arizona or Texas, if they are in south California or if they are in northern California, they are sent to Salt Lake City or Portland or Seattle, any place we can dispose of them outside of California.

Q. What effect, if any, does this have upon these other markets as far as your sales are concerned?

A. It naturally upsets these other markets to have a load of fruit dumped into them, either in good or in poor condition, at best, and it amounts to an oversupply at worst. It amounts to a great deal of fruit, a great deal of ripe fruit, which has to be sold for most any price which has an unsettling effect upon the market.

Q. What is the time lag for a shipment of avocados from Florida to California?

A. Approximately five days to California.

Q. Then there would be some further time in California?

A. Yes.

[fol. 182] Q. For inspection and handling and reshipping—

Mr. Fourt: I object to the question as being leading and suggestive.

A. Usually about a day is involved in the inspection and/or rejection procedure in the particular California market. Then, of course, there is a delay involved of further trying to arrange for reshipment, which isn't easy to have a part load go to Salt Lake City or Portland. It is not only very expensive, but it is difficult to get the reshipment maintaining proper condition of refrigeration and speed.

Q. Taking into account the trip and all that happens in connection with the reshipment and resale, what would be the whole time period?

A. You mean the whole time involved in a rejected shipment?

Q. The whole time involved in a rejected shipment.

A. Usually I'd say seven or eight or nine days, but the difficulty involved there in many cases is that the fruit after it is rejected is not necessarily under supervised control which would insure its being kept in good condition. We many times take a loss on reshipment, because of it going out of our control and becoming ripened or damaged in some way or other.

Q. When you say "ripe", in what sense do you mean?

A. Soften.

Q. Is an avocado a perishable fruit?

A. Very perishable, if not kept under proper refrigera-
[fol. 183] tion at all times.

Q. Mr. Kendall, have you requested your accountant in your office to compute from the sales records of the company the volume of avocados sold by your company since the commencement of 1954-55 selling season?

A. Yes, I have asked my accountant to work some figures out. I worked with him.

Mr. Ferguson: I will ask the Court Reporter to mark these (indicating) pages as Plaintiffs' Exhibit 18, for identification.

By Mr. Ferguson:

Q. Does the statement now marked Plaintiffs' Exhibit 18, for identification, truly reflect by the books and records of your company the volume of avocados handled in the four calendar years 1954, 1955, 1956 and 1957, also the distribution of sales under these three headings, "Sales in Florida", "Sales in California", "Sales in other States", the distribution in the years 1956 and 1957 and then a computation of the percentage, is that all true and correct?

A. Yes, those reflect the figures from our records.

Q. And the statement is true and correct?

A. Yes.

Mr. Ferguson: This document will be offered in evidence as Plaintiffs' Exhibit No. 18.

By Mr. Ferguson:

Q. Mr. Kendall, have you a demand for Florida avocados in chain store organizations or commercial merchants in [fol. 184] California, which you could not supply because of the California 8% oil test?

A. Yes, I think every year we have requests for avocados to be shipped to California both by people in California and by shipping brokers from this area here and we have never been able to comply with these requests for shipment.

Q. Tell us about these requests.

A. Especially in the beginning part of the season, it is only during the last part of the season which we are able to make the shipments with any—well, for one thing, Safeway organization for the last four or five years in California have used a great many avocados from not only me but other shippers down here and every year all through the month of October and early November they were trying to get all of the avocados they could from us. We were unable to make shipments then, even though it was at the peak of the shipping season and we were making shipments all over the United States, to Phoenix and Portland, right to the border of California, but we haven't been able to ship into the State of California during the month of October.

Safeway and Lucky Stores, one of the large stores, were interested in our supply of avocados and produce houses on the markets in Los Angeles and in San Francisco have asked for shipments repeatedly. In addition to distributors in Florida making mixed fruits are interested in big Florida avocados to include in their shipments of citrus going out [fol. 185] there. It has been true during the last part of October and early part of November. That is especially true during the shipping season of Booth 8s, we haven't been able to make a shipment out there of that one variety. We have another big peak and that is the Lula. We have a big supply available in October and early November.

Q. Can you name some of these persons or organizations?

A. I think I forgot to mention—

Q. With whom have you had communication about shipments to California?

A. I think I forgot to mention Calavo Growers, who represent me in the California markets, have also wanted to get shipments of avocados to handle—shipments of Florida avocados to handle in California markets just as early each year as they possibly could get them, indicating a considerable demand for avocados was at those markets at the time and they could use pretty near all they could get.

I think it should be understood we are in business or are operating on a day-to-day basis and a good deal of the communication is by telephone and we don't have a great deal of written requests, because we are in touch with our sales agents nearly all the time, every day, usually, and requests come up frequently in the conversation, "When will the company ship to California", or at least in that particular vein.

I think I might say in particularly mentioning names that Safeway organization, Mr. Jules Merkle, who is the East-[fol. 186] West Field Buyer with offices in Lakeland, Florida, and Mr. Jake Snoddie in Belle Glade. He is the Belle Glade buyer. Mr. Burris, who is their Eastern Produce Supervisor with offices in New Jersey, who used to be in California, came in the office in September of 1957, this season, and requested shipment of avocados to California, just as soon as they possibly could get them, because they had very favorable experiences with the Florida avocados in the last year and wanted additional shipments as soon as they could get them. I believe they indicated they had a number of people—their experiences in their stores were that they had a number of people who preferred the larger Florida avocado, possibly preferred them to the smaller California avocado, maybe for the mild flavor and low calorie content and lower oil content.

Anyway, he indicated he thought people were eating Florida avocados in the East, West and all over California and they had potential and actual customers for Florida avocados in the markets they serviced.

I might say the particular marketing organizations, such as Lucky Stores in San Francisco, use a large amount of Florida avocados whenever they can get them and certainly Calavo has ordered a large quantity during the season.

Q. Name some of the people in Calavo with whom you have had some communication on this subject?

A. Usually any communication through the year would be with the San Francisco manager, Ed Peters and the Los [fol. 187] Angeles manager Al Jones, in Los Angeles.

I might say, however, that there have been other people in the Calavo organization who expressed interest in handling avocados out there primarily from the sales standpoint because they felt, I think, they felt that other people were handling Florida avocados and there was no reason why they couldn't, since there seemed to be a demand and they wanted them.

Q. Did you get any letters on this subject from any of the Calavo people?

A. This (indicating) is on October 6, 1955, the traffic manager for Calavo in Los Angeles.

Q. What is his name?

A. Paul Helin. He said, "Am sure that Calavo's Western Division staff will do everything possible to get its share of Florida avocado business. We are hoping that your supply situation will permit us to be reasonably competitive."

Evidently, we had been in phone conversation because of this memo I wrote to Paul Helin on October 27, "With reference to our phone conversation I understand that both Lulas and Booth 7s in the last three or four days with warm, dry weather I would believe there should be shipments going to California towards the latter part of next week. Will let you know how the tests come out the first of next week in order to keep you posted."

Mr. Fourt: May I see those two letters?

The Witness: Yes.

[fol. 188] Mr. Ferguson: Well, finish the answer and then we will let him look at all of them.

By Mr. Ferguson:

Q. You go ahead and finish.

A. I will continue. Last year I have a notation here on a letter dated November 2, 1956, addressed to Mr. Harvey Futch, another shipper of Florida avocados to Calavo and to myself from Mr. Gene Royle, who was a sales expediter

at the time and he said, "Any information at all that you can give us will be greatly appreciated, because all of the boys are chafing at the bit to get sarted on Florida avocados.

"The four or five truckloads for Oakland are all 14 size, so we hope this size will be available in quantities when the 'go-ahead' is given on shipments to California."

He further says, "We now have on order five truckloads for Los Angeles and another four truckloads for Oakland, California. These, of course, are just starters and our orders will be considerably more than this when the deal opens up for the California markets. We will appreciate receiving reports from both of you as to how the maturity is coming along, because we definitely want to be in on the ground floor for Florida avocados in California markets. This is the one thing that the boys are stressing the most, that we have them first so we can be in the deal from the very beginning."

And then this about four or five days later on November 7 Mr. Allen Mishaud, General Sales Manager of Calavo [fol. 189] Growers noted that, "Gene Royle is sitting with a number of orders and nearly all of our boys seem to have a good bit of backlog. If the interest and strength develops, we ought to be able to offer you a darn good market here for some of your fruit."

I haven't been able to look through my records sufficiently to find a great deal more. As I pointed out, a good deal of our conversations are on the telephone. I don't have a great deal of written memos other than just day-to-day indications.

Q. Plaintiffs' Exhibit 17, for identification, as to this classification "Sales in Other States", can you state in a general way what territory that includes?

A. "Sales in Other States" is the 47 other states. It is all of the other 47 states, principally in the Northwest, Portland, Seattle; Middle West, Chicago, Cleveland, Kansas City area, and in Southwest in New Orleans, Dallas, Houston, Antonio; East, Washington, Philadelphia, New

York and Boston. Primarily in the areas of large terminal market distribution.

Mr. Ferguson: You may cross-examine.

Cross-examination.

By Mr. Fourt:

Q. Mr. Kendall, you mentioned doing business as the Florida Growers Association; is that a sole proprietorship?

A. Yes.

Q. And is it true that you were in business from July 9, 1953?

[fol. 190] A. As the Florida Growers Association, yes.

Q. During those dates, have you had occasion to ship any avocados to California?

A. No. I didn't ship any to California. I believe other shipments were made by competitive shippers, but I believe at the time Calavo Growers wouldn't handle any. My competitors were shipping, but I wasn't able to ship any.

Q. Do you know of the varieties that your competitors were shipping in California during that term or terms?

A. No.

Q. How long have you been president of the South Florida Growers Association?

A. Since April of 1953.

Q. And what percentage of stock do you hold in that corporation?

A. Well, Mrs. Kendall and I have control or own all of the stock in the corporation.

Q. With respect to your groves that you own in your name, what varieties do you grow there?

A. Primarily Pollock, Fuchs, Waldin, Booth 8, Booth 7s, Lulas, maybe a few other minor varieties, but those are the primary ones, I believe.

Q. Prior to the inauguration of the Florida Marketing Order, is it true that the presence of a hurricane would tend to hurry the picking of avocados?

[fol. 191] A. No, but when a hurricane is around, people tend to want to pick a little more heavily than they ordinarily would. However, I might say the tendency in all

of our marketing prior to our Marketing Agreement and prior to these large increases in supply was to hold back our fruit because the prices were righer as we went along throffgh the season, because frequently we didn't have many of the late varieties, enough of what you would call the late varieties. So the tendency was to hold even though a good deal would drop on the ground, it still was the tendency to hold.

Q. Prior to the issuing of the Marketing Order and when the warning of hurricane was marked, didn't a lot of that fruit hit, fruit in an immature condition, the market and have a tendency to spoil it?

A. There was a tendency to pick more of the varieties being picked at the time. You see, most of the hurricanes come in the period of August and September and during that time your Waldin variety is the principal variety and most of the growers would tend to pick their Waldin variety ordinarily, because in the six or seven week period, if a hurricane was coming, there would be a tendency to pick a little more heavily on the Waldin. I don't think there would be too much movement of Lula and Booth 8 prior to the Marketing Agreement program.

Q. That is, late hurricanes might cause them to market immature fruit?

A. I wouldn't say immature fruit, you would move more [fol. 192] Booth 8 and Lula.

Q. Prior to the Marketing Order, would a rise in the market price cause some immature fruit from Florida to be sent to the California market?

A. Well, it might be—I wouldn't say immature, it might be more fruit would go to market when the prices got higher. I think the same thing applies there as to the hurricanes, the growers would tend to pick heavily after market prices rose on the particular variety they were picking at the time.

Q. Is it true, Mr. Kendall, that the main varieties that everybody either planted or want most are the Booth 7, Booth 8 and Lula varieties?

A. Yes.

Q. Is it your estimate that in the future in Florida, say between the next five to ten years, that approximately 75

to 80 per cent of your total marketed production would be in those three varieties?

A. I believe, if you include Waldin in there, it might be. Waldin, Booth 7, Booth 8, and Lulas would be probably about 75%.

Q. Mr. Kendall, I show you Plaintiffs' Exhibit 13, for identification; now, the first page at the top part is a summary of tests made during 1954-55 season. Did you personally deliver any of the shipments to the Homestead, Florida Experiment Station?

A. No.

Mr. Ferguson: You mean samples?

[fol. 193] A. Samples?

By Mr. Fourt:

Q. Did you personally pick any of those samples?

A. I may have, but I couldn't say which ones.

Q. By far, the majority of these samples were not picked by yourself; is that right?

A. Yes.

Q. Page 2 of Plaintiffs' Exhibit 13 refers to oil tests made during 1955-1956 season. Did you personally deliver any of those samples indicated on that page to the Homestead Experiment Station laboratory?

A. No.

Q. Did you personally pick any of those samples?

A. No.

Q. Page 3 of Plaintiffs' Exhibit 13, for identification, purports to cover the oil tests for 1956-1957 season. Did you personally deliver any of those samples to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of the samples?

A. I may have, possibly. I might do well to explain the procedure in which these are gathered.

Q. May I ask you one more question as to the sheet?

A. Yes.

Q. As to this 1956-1957 season, would you say that by [fol. 194] far the large majority of the samples were not picked by yourself?

A. Right.

Q. The last page of Plaintiffs' Exhibit 13 purports to cover the 1957-1958 season. Did you personally deliver any of those samples to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of those samples?

A. I may have.

Q. Would you say it would be true that the majority of these samples were not picked by yourself?

A. Right.

Q. Do you wish to explain the procedure, now?

A. I think it is only fair to state that I have around 200 to 250 people working for me. The man in charge of my field work, the superintendent of my field crew and his assistant are the ones who are in charge of harvesting, making the selection of samples and delivering them to the experimental station and bringing back the results after they are obtained. So there would be no occasion to make a personal test.

Q. Mr. Kendall, judging time from today backward at what period or point of time did you determine to test the California Oil Standard.

Mr. Ferguson: That's objected to. I'll object on the grounds it is not proper cross-examination.

By Mr. Fourt:

Q. You may answer.

[fol. 195] A. I am not sure as to the point of time, but I believe it goes back over the last three or four years when we found—I believe that it would be about certainly, as I said, in the last couple of years anyway.

Q. Taking the date on Plaintiffs' Exhibit 13, for identification, the test appeared in October, 1954, did you consider this problem of the California Oil Test as early as that date?

A. Your question is did I consider the California Oil Test problem as of the date of the test? The oil problem was our concern.

Mr. Fourt: I withdraw the question.

By Mr. Fourt:

Q. Did you consider the filing of a suit, of a lawsuit, to test the California Oil Standard as early as October, 1954?

A. As a matter of fact, I don't know just when we did consider it. It has been considered over the past several years, but I don't know just when. It is pretty difficult to pinpoint the exact time we decided to question the oil content.

Q. In fairness, would it be fair to say several years would be at least January 1 of 1956?

Mr. Ferguson: I am going to object, because you are using a vague word "considered". I don't know what you mean by that and I don't know if the witness knows what it means.

By Mr. Fourt:

Q. You may answer.

A. I'll be frank, I don't know when we did come to the [fol. 196] decision to.

Q. Well, perhaps I can rephrase the question. In November, 1956, did you have a probable lawsuit in mind testing the California Oil Standard when you requested tests be made by the Experiment Station at Homestead?

A. I don't know whether you can say we had a possible lawsuit in mind. We weren't looking for a lawsuit, but over a period of time we Florida growers felt the oil content standard was unfair, but I don't know just when we arrived at the decision to question it.

Q. Your best estimate is several years back from today?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 13, for identification, on the first page, 1954-1955 season, is there any particular reason that a test would have been selected on that particular date, October 14, 1954?

A. No, other than what I stated before. We were usually looking over Dr. Harding's shoulder and asking him how the oil content was running—

Mr. Ferguson: You mean Dr. Harkness.

A. (Continuing) Dr. Harkness and asking him how the oil content tests were running and then we would try to figure out what groves, what varieties might possibly come close to the 8% and that is when we started gathering our samples.

Q. What is the value of your—first of all, what is the [fol. 197] location of your packing shed?

A. I object to you calling it a "shed".

Q. I will sustain your objection.

A. It is called the Pink Palace.

Q. Where is it located?

A. U. S. Highway No. 1, between Princeton and Goulds, which is approximately 25 miles south of here.

Q. What should we call that establishment?

A. A packing house.

Q. What is the approximate value of your packing house at current market prices?

Mr. Ferguson: I don't see how that is a proper question.

A. It is about $300,000 worth of building and about $100,000 worth of machinery and equipment, with another forty or fifty thousand dollars worth of improvements. Approximately $500,000.

Q. When was the packing house built?

A. It was completed in August, 1955. I had other packing facilities, however, which were started in January, 1940.

Q. At any time from August of 1955 until today, have you purchased and set up any testing equipment for use in the packing house for the purpose of making the California Oil Test on Florida avocados?

A. Not in my packing house.

Q. What reason, if any, did you not do so?

A. Well, we relied upon the Experiment Station to make [fol. 198] whatever tests were required and we didn't feel the necessity of big testing equipment for our use alone. As a matter of fact, the Experiment Station purchased their equipment at the request of a number of growers and handlers.

I believe I may say we never made a shipment of avocados to California until after we had made tests or had tests made by the Experiment Station of those particular groves we wanted to pick the fruit from for California

shipment. We always kept the fruit that went to California separate all the way through the picking and packing operation, pre-cooling and so forth. That was so there would be no chance in our mind to mix a lot of fruit that would go below the 8% after it got out there.

Q. Was any effort made to test fruit other than the fruit which was tested in Homestead as previously described in your previous testimony?

A. No.

Q. To rephrase that, were any tests made of fruit selected at the packing house?

A. No—with this possible exception, if a grower that picked a lot of fruit, sizable quantity of fruit, we might take a sample out of that and run it to the Experimental Station and try to get a test on it right quick to see if it was possibly suitable to ship to California.

Q. Would you say that would be an unusual situation, as far as the usual testing method?

[fol. 199] A. The usual testing method was to check the grove and proceed with the harvesting of the samples and have them tested.

Q. Did you ever select samples from the fruit after it had been packed and loaded on a truck?

A. No.

Q. Directing your attention to Plaintiffs' Exhibit 18, for identification, is it true that 1955-1956 California avocado production was limited this year, that is, to California was a short year?

A. I don't recall. I think the statistics, which would answer that question, would be better than me. I am not familiar with it at the moment.

Q. Was the 1956-1957 year a short year as far as California production was concerned?

A. I don't know. I am not familiar with the California production figures at the moment.

Q. Do you have with you the figures for sales in California for 1954 from the South Florida Growers Association?

A. I don't think so, no, I had a record of some shipments —I don't know if that is a complete recap on it, I am not sure.

Q. Would it be possible—

A. I have some figures on the 1954 shipments, that might be all there were, but I am not sure.

Q. Would it be possible to obtain those figures for us?

A. I could obtain them for you—total shipments made to [fol. 200] California in '54-55, the only reason they aren't here is because they couldn't be obtained because of the shortness of time to get the proper figures. We started 1957 and worked back to obtain these figures.

Mr. Fourt: Would it be possible to arrange with you to have the figures provided to us?

Mr. Ferguson: Let's agree they will be added to Plaintiffs' Exhibit 18.

Mr. Fourt: All right. Is it possible to get the appropriate entries in the other states?

The Witness: I am not sure we can get the sales figures in Florida. I am not too sure of the sales in Florida. Sales in other states— we can get the sales in Florida by taking the total less the sales in California. You take the column "Sales to California" in 1955 and take the "Sales to Other States" in Plaintiffs' Exhibit 18 and—

Mr. Ferguson: Well, as soon as possible, but not necessarily while—these are old records and, frankly, I settled for these because of the time element. I asked for them.

Mr. Fourt: Would it be possible that a new Plaintiffs' exhibit number could be assigned to the new paper which would provide a further exhibit rather than an extra entry?

Mr. Ferguson: We can do it in time for the Reporter here to—

Mr. Fourt: Well, after you complete the new document [fol. 201] and assign a new number. We can get a copy of these other shipments and put it with this other information and not expunge it from the record. There will be some duplication, of course.

Mr. Ferguson: Let's start with this volume figure, there will be some duplication of a similar exhibit, and leave it as it is.

That number will be 19.

Mr. Fourt: That is 19, an exhibit similar to 18, but with the added figures for '54 and '55.

The Notary: Let the record show we are reserving that number for the additional information.

Mr. Ferguson: Can we also agree that it will be covered by the testimony of the witness with respect to Plaintiffs' Exhibit 18 for identification?

Mr. Fourt: So far as foundation for the document?

Mr. Ferguson: Yes, as far as the figures and accuracy.

Mr. Fourt: In fact, there is no testimony regarding 19.

Mr. Ferguson: Only that we agree the same testimony will apply.

Mr. Fourt: Right.

(Thereupon, the deposition was adjourned at 5:00 p.m., to be resumed at 7:00 p.m.)

By Mr. Fourt:

Q. Mr. Kendall, if I might see the yellow sheet and the other computation that you refer to.

[fol. 202] A. Which one is that, now?

Q. The computation and—yes, that (indicating) sheet and the yellow sheet too.

(Examining documents.)

Q. (Continued) Mr. Kendall, I hand you this document and ask you if that is a complete listing of your shipments to California in 1954 and 1955?

A. To the best of my knowledge, it was.

Mr. Fourt: Mr. Reporter, I should like to have you mark this copy (indicating) and ask you to mark it at the top as it is in pencil 1954-1955 Shipping Season, next in order. That is Defendants' Exhibit "P".

By Mr. Fourt:

Q. Mr. Kendall, is this the document which I referred to just a moment ago, 1954-55 Shipping Season, now marked Defendants' Exhibit "P" for identification?

A. Yes.

Mr. Fourt: Mr. Reporter, I hand you a document headed California Avocado Shipments 1956-1957 season, and ask you to mark this as Defendants' Exhibit "Q".

Mr. Ferguson: What is that?
Mr. Fourt: '56-57.

By Mr. Fourt:

Q. Mr. Kendall, I hand you Defendants' Exhibit "Q" for identification and ask you if this document enumerates all of the shipments from the South Florida Growers Association, Inc., from Florida to California during the period [fol. 203] 1956-1957 season?

A. To the best of my knowledge, it does.

Q. Mr. Kendall, I wonder if you would make available to us your folder which you previously said contained all of the documents listed in Plaintiffs' Exhibit 17 for identification?

A. Here are four shipment records on the four shipments that were made in the season of '54-55 which refer there as having part of each rejected. There is the folder (indicating) covering those four.

Mr. Ferguson: While you are looking at that paper, may I have the last paper identified?
Mr. Fourt: I will give you both of them.

(Examining documents.)

By Mr. Fourt:

Q. Mr. Kendall, I hand to you the documents which purport to cover the shipment on November 10, 1954, which appears in the top paragraph of Plaintiffs' Exhibit 17 for identification and ask you if you can inform us from those documents what the net return from the South Florida Growers Association was from that shipment?

A. No, I don't think—wait a minute, yes, the net return would be the total of the two, $1700.26, and $423.53.

Q. Now, from those papers can you tell us your profit on the shipment?

A. There is no question of profit, the question is raised as to loss.

[fol. 204] Q. From the figures you gave, what expenses or items would you deduct to determine the loss or profit?

A. As I stated, upon arrival at Los Angeles 118 rejected

upon test of oil content and reshipped to Phoenix, Arizona. Sales in Los Angeles average $4.43 per box, whereas, sales in Phoenix were only $4.17. If you take the difference from 118 boxes and multiply it out, it comes to $30.68 and then added transportation from Los Angeles to Phoenix, $29.17 makes a total of $59.85, which is what we claim as a loss on the shipment.

Q. Mr. Kendall, is it not true that the sum $59.85 shown in the paragraph 1 of Plaintiffs' Exhibit 17 represents a reduction in profits to the South Florida Growers Association which was caused by rejection of the shipment in California?

Mr. Ferguson: I will object to that as being purely argumentative. The exhibit states the difference in the yield. There is no question about profit. If it is possible here to determine profit, you can go outside of the whole thing and get a cost accountant to analyze the business of the company to determine whether there was any profit in any one particular sale.

By Mr. Fourt:

Q. Did you hear the question or do you want it read back to you?

A. I heard the question, but I couldn't answer that without an accountant to analyze the costs and so forth. As far as we were concerned, it represented a loss.

Q. It is not a loss, is it, Mr. Kendall. It represents a [fol. 205] loss only if California had accepted the shipment, and that would have caused your returns to the Florida organization to have been increased in the amount of $59.85?

A. Yes, we would have got the $59.85 we were supposed to in Los Angeles along with the rest of the shipment.

Q. Right. You have no information as to your actual net profit or loss on this shipment?

A. I haven't any information here and it would take a good deal of accounting.

Q. Which is a complicated procedure because of the scope of your operation?

A. I would say that's a conservative estimate as to the

losses. In sending this fruit to the Phoenix market on top of the fruit that is already there, the price of the fruit was reduced as the result of the fruit going up there on top of that that was there, as well as the shipment that was directed to Phoenix. We ship to Phoenix without going to California and when this fruit comes back on the Phoenix market, it depresses the price of all the fruit. I just analyzed what I lost on it, if it were sold in Los Angeles. That's what I referred to when I said it went back to Phoenix.

Q. Directing your attention to the second paragraph on Plaintiffs' Exhibit 17 for identification, involving a shipment on November 11, 1954, is it true that the last figure being $394.20 represents the sum which South Florida [fol. 206] Growers Association did not receive as a result of the California rejection which they would have received, if the shipment had been accepted?

Mr. Ferguson: I will stipulate that that is true of everyone of these. That is what it is intended to show.

By Mr. Fourt:

Q. Is it further true, Mr. Kendall, as of this moment, you are unable to say the actual net profit or loss to the South Florida Growers, Inc., which left Florida approximately November 11, 1954?

Mr. Ferguson: I think it is argumentative.

The Witness: You started to ask about a figure we got that was profit?

By Mr. Fourt:

Q. No, net profit.

A. How can you determine the net profit without going back to the records and find out what it cost to pack them and what it cost to get them out there? As far as we were concerned, we shipped to California on that market and a good deal of the boxes were sold at a certain price. When they were rejected, then we re-shipped elsewhere and we lost money—we figure we lost money as the result of that.

Q. To come back to my question, however, because of this

tremendous auditing problem, which would be involved in finding the cost on November 11, 1954, you are unable to say or to give us the actual net profit or loss on this shipment?

Mr. Ferguson: Again, I say that this is just argument [fol. 207] and quibbling.

These are losses. They had sales for these and they lost the money.

The Witness: We are not in business for shipping at a loss or shipping and breaking even. If we lost a certain amount of money, we lost it.

By Mr. Fourt:

Q. However, Mr. Kendall, isn't it true you are unable to give the figure of actual net loss or profit on the shipment of *November 11, 1954*?

Mr. Ferguson: Same objection.

A. I can't answer any differently.

By Mr. Fourt:

Q. Is it true you cannot give that answer because it would require an auditing?

A. Yes, it would require a further audit.

Q. Now,—

A. I might say that in shipping this fruit to California a lot of this was pretty well booked on arrival. I mean, before shipment in some cases, in fact, we very seldom ship without some assurance because we send them out there on fairly firm sales, that's about the only basis we did ship on. When we run into this difficulty there, we actually figured we took a loss on it.

Q. In order to save time, I believe Plaintiffs' Exhibit 17 for identification shows 7 shipments during the period 1954 through 1957, is that correct?

A. That's right.

[fol. 208] Q. Is it true, Mr. Kendall, that the figures shown as a loss for each of those shipments is the amount by which the gross returns to South Florida Growers Association,

Inc., were reduced as a result of the actions of the State of California?

A. Yes.

Q. Mr. Kendall, has the South Florida Growers Association, Inc., ever attempted to recondition that portion of the lot in California which was rejected because of the failure to meet oil test standard, or has the consignee in California?

A. The Calavo sales organization of California in their offices, I believe, have attempted to recondition them.

Q. Have you or any of your consignees, such as Safeway Stores or Lucky Markets attempted to recondition the lot or portion of the lot which was rejected?

A. Well, Calavo handles our sales and organization out there and if there is any difficulty they handle the negotiations with the Inspection Department.

Q. Have you during the years 1954 through 1957 given any instructions to Calavo Growers, Inc. regarding reconditioning the lot or portion of the lot which is rejected by the California Inspection Service?

A. I don't know that I have told them exactly how to handle the actual reconditioning, but when we do have some difficulty with a lot, there are some conferences on the telephone between the various persons in charge, when [fol. 209] it is in Los Angeles or in San Francisco, about the disposition of the lot and whether we should ship it to Phoenix, Portland or Salt Lake City.

Q. I am referring to the reconditioning or reshipping with respect to the specific instructions that are given Calavo Growers as to the physical re-sorting of the fruit which is rejected.

A. No, I haven't told them that. I think in the trade it would be understood, in the trade, anyone representing you should make every effort they could to handle the shipment to the best advantage. If they felt it would be best to re-consign it or re-sort it, it should be done.

Q. Could you list at the present time the 10 leading marketing centers, municipalities or areas of the South Florida Growers Association for the last season '57-58 season?

A. You mean list—

Q. The most important centers.

A. Distribution centers?

Q. Yes.

A. For my particular organization or the industry?

Q. No, for your particular organization.

A. I couldn't give you the exact figure without looking at my records and I don't belive they are in shape where they would reflect it without a great deal of tabulation.

Q. Can you give us the leading 10 centers for the South Florida Growers Association?

A. I don't know whether I can list the exact 10. There is New York, Chicago, Cleveland, New Orleans, Houston, [fol. 210] Dallas, probably Washington.

Q. Washington, D. C.?

A. Yes, and the Northwest, we usually combine Portland and Seattle and certainly the California market should be in there, either Los Angeles or San Francisco or both.

Q. At the present time is your Los Angeles market smaller than any single city you have otherwise named?

A. It would be difficult for me to tell, because I don't have access to the figures at the moment. It varies a good deal according to the marketing pattern of the time of year and so forth. It would be a little difficult for me to give you that.

Q. Is New York your best market?

A. No.

Q. What is your best market out of the State of Florida?

A. Oh, probably Chicago, we take distribution areas. With Calavo it is a little difficult to tell where this fruit is going after they reship it. You understand Calavo is the sales organization for most of my fruit. It is hard to pinpoint exactly, but I would say Chicago is one of the best markets.

There, again, I might say New York quite readily because—well, the Calavo organization of New York isn't as good a distribution center for me as it may be for one of my competitors who might say New York is one of the best distribution centers. So my figure may not be typical of the industry.

Q. What is the next leading center, approximately, to [fol. 211] Chicago?

A. I would say probably the St. Louis-Kansas City area.

Q. What is your third choice as the third largest market?

A. I would like to group by the East and put Washington, Philadelphia and New York together. That is the way they load the trucks. Usually they stop at Washington and Philadelphia—we don't know how much is coming off. It isn't hard to stop when you are going right along the line, and that is why I hesitate when I answer that question as to the exact shipment to various points.

Q. Would you say the Los Angeles market during the 1957-58 marketing season to date is smaller than the Chicago area market?

A. That is the '57 to '58 to date?

Q. Yes.

A. I think so, yes.

Q. And is the Los Angeles area market for the same year smaller than the St. Louis-Kansas City market?

A. I think probably. But you must remember that in the St. Louis-Kansas City market we aren't under restriction. We can ship from the first of July right straight through. Remember you are comparing a total of six or seven months shipping, as compared to the Los Angeles market for maybe a month or six weeks or two months.

We ship into Los Angeles in September or October. I can show you where Los Angeles is one of the larger mar- [fol. 212] kets in the country for the Florida avocado.

Q. For the marketing season 1957 and '58 to date, was the Los Angeles market smaller than the New York market area—let's make that Washington, Philadelphia and New York market area?

A. Yes. There again you have the same reason. You are shipping to those areas through the summer and fall.

Q. If I can lump together the cities, is it not true that the San Francisco marketing area is smaller for the same period of time than either the St. Louis-Kansas City area or the Chicago area or the New York-Philadelphia, Washington area is concerned individually?

A. You mean the same period of time? If you took the same period of time we were shipping to the San Francisco marketing area in a given period like in November, when we are allowed to go in California with fruit at 8%, I think that the San Francisco market would probably be

right next to Los Angeles as one of the largest markets in the country. You can't compare the restricted shipments we made to California in any one season in total to the markets such as San Francisco or Los Angeles. They wouldn't come up to the St. Louis and Kansas City area where we ship for a period of six to eight months.

Q. Is that true of the Chicago area?

A. Yes.

Q. Is it true of the Washington, Philadelphia and New York area?

[fol. 213] A. Yes.

Q. Mr. Kendall, isn't it true that there are certain conditions which can affect avocados after they leave your packing plant, which may affect their sales value in the ultimate destination?

A. If they are properly handled, I don't think so.

Q. However, if they were improperly handled so as to cause a certain defect, which you had no control—

A. We have pretty good control over the shipments because we pre-cool all fruit shipped under refrigeration, we check the shipments daily and on arrival the temperature is taken and we eliminate the outside influences pretty thoroughly on all of our shipments. Now, if it was mishandling or if there was delay for any reason, then we might have difficulty.

Q. Isn't it possible that Lucky Markets, for example, in California could put some South Florida Growers Association avocados in storage, thus rendering these avocados in poor condition?

A. I don't think so; if they were received in good condition, I don't think they would keep them so long as to cause—our experience with Lucky and Safeway, they order shipments to arrive practically on time. Their orders are based upon daily or weekly need. They order ahead of time and schedule the shipments to come in as they need them. They could keep them conceivably—suppose they ordered a few days too much of a supply, that storage period [fol. 214] wouldn't hurt Florida avocados, because they will keep several days or weeks in storage under proper conditions.

Q. Would you say, although it is improbable, it is pos-

sible that Lucky Markets might hold them too long in storage before placing them on the retail shelf?

A. I doubt if they would. They don't buy any more than they are going to use between a two or three day business period. Lucky Stores would have no difficulty at all disposing of a truckload through their markets in two or three days.

Q. Isn't it possible your consignee might damage the fruit of South Florida Growers Association through excessive low temperature causing freezing damage?

A. It is possible, but not probable, because their coolers are set up for proper refrigeration for any of the produce they handle. It is just some—I have been in Lucky Stores' warehouse and they have a modern plant. They have a cooler set up to handle the type of produce they handle.

Q. Mr. Kendall, in respect to the operation in Florida, isn't it true the Federal-State Inspection Service maintains inspectors in Florida packing houses?

A. Yes, practically all the time.

Q. Has this inspector ever rejected any of the fruit in the packing house?

A. We don't use the word "rejected," because he just doesn't accept the fruit. He doesn't allow it to be stamped. [fol. 215] He doesn't accept it, unless it meets the specifications of the Avocado Administrative Committee which are currently in effect.

Q. Is it true then that the inspector who is stationed at the South Florida Growers Association packing house has on occasions refused to accept some of the fruit passing through the house?

A. Not that I know of. In other words, our procedure is to bring the avocados in, in field boxes, bulk, and then put them into our polishing-sizing equipment and right at that point the inspector checks for size, or weight, as the case may be. So, before the fruit is packed, he is checking it. Now, he would have no occasion to reject them from that point on, because he has checked them before they are packed and it is right under his supervision. It is right outside his office where the fruit is stamped as it goes right by to the packers.

Q. Has the inspector had occasion to refuse to accept

or approve fruit at the stage of the operation where he makes the inspection?

A. Oh, yes, if they are undersized fruit. He stands there and continually checks to see if they are undersized and if they are undersized, they have to be destroyed.

Q. What happens when the inspector discovers fruit at that stage of the process and it is undersized?

A. Any undersized fruit can't be shipped. We have to dump it.

[fol. 216] Q. At what stage does the inspector make the inspection?

A. He makes the inspection at the end.

We have bins where the fruit comes off the sizer and at the end of that sizing belt where they go into the bins is where he is checking them. He checks them there and he checks them in the bins as the packers are packing them. The checking is right there where they drop off the belt in the bin and he is checking the bins right there.

Q. Can you give the approximate percentage of the fruit which does not pass the Avocado Administrative Committee regulations at the point where they make the inspection?

A. That would be very difficult to say, because most of the growers that are picking for us—they have what they call a ring sizer. They have this right with them and check the size of the fruit when it is picked. If some way or another one gets through, that is caught at the point where it comes out at the end of the sizing belt before it goes into the bin, and it doesn't get packed. However, in a few cases some growers who may not have used a picking ring may come in with some fruit which is maybe 5%, maybe 10% undersize, well, that fruit is all caught right at the point and not packed. It is eliminated. I would say our percentage varies from zero up to 10 or 12 per cent on an average. For good picking it is around 3, 4 or 5 per cent.

Q. Would it be true as to the most ideal shipment that the percentage of rejections would be near zero on occa- [fol. 217] sions and on other occasions would be 10%?

Mr. Ferguson: He didn't say that.

By Mr. Fourt:

Q. Would you say the fruit coming into the plant that is rejected would be or might be 10%?

A. Nobody wants any fruit eliminated because it doesn't meet the Avocado Administrative Committee regulations. So we all try to pick to the best of our ability under the limitation of those regulations and if we go very high in our percentage of loss as the result of undersized fruit, it is because someone is making a bad mistake. They should note what the Avocado Administrative Committee's regulations are. I believe all of the growers do know what the Avocado Administrative Committee's regulations are. Most of the growers know what the picking schedules are and recognize them. I don't think any grower picks his fruit with the idea of having them rejected at the packing house, so they are very careful.

Q. Is it true that on occasions there are serious errors of judgment and there might be as high as 10% rejected by the inspector?

A. Yes. In fact, I might say we have had some growers that just pick some fruit and brought them in and when they were checked, maybe the whole thing was unable to be shipped. But that has been in very few cases. We have gone on around on this thing over the last four years and the growers have learned what their limitations are and they try to follow it, because they know they have to.

[fol. 218] Q. Is there any average figure as to the size of the shipments coming into your packing house; that is, do they come in in lots of 100, 150 or 300 or what is the size in which they come into your packing house?

A. Mr. Fourt, they vary considerably all the way from 100 bushels to a truckload. As a round figure, depending on the size of the truck, anywhere from 150 to 250 boxes at a time. I would say, though, in Florida our average size of shipment is probably closer to 75 to 100 boxes and smaller.

Q. Now, you are referring to the size of the lots entering your packing house?

A. Yes.

Q. Are these lots of 75 to 100 boxes of intermingled avocados passed over the grading line?

A. They are handled as separate lots and a lot ticket follows through where they are graded and sized and packed, but they are not commingled in lots. They are kept separate until they reach the bin at the end of the sizing belt where they are inspected and put in bins. So they are not commingled until they go into the bin.

Q. When you say the bin, you mean they are placed in a bin according to the size of the fruit?

A. Yes.

Q. Is it not true that in these bins there may be avocados [fol. 219] of numerous producers there from the last two or three days?

A. Not over two at one time, because we run lots that are a little larger in size than would be in other producing areas. I can't pinpoint one when I say 75 to 100, I mean a truck might bring in 75 to 100 and they might bring in three trucks or so from the one grove. We run a lot of 200 or 300. So we actually run larger lots than 75 to 100 in a great many cases.

We try to eliminate the mixing of lots in the bins.

Q. During the 1957-58 season to date, can you estimate the number of different groves which would contribute fruit to your packing house?

A. Well, do you mean groves under my management other than my own, you mean individual growers? In other words, I own or handle probably, I guess, about 40 to 50 groves.

Q. Consider each grove as one unit.

A. Well, I guess we actually get fruit in our packing house from say 75 groves, I guess. You see, for example, I know Mr. Krome has maybe 100 acres. They are all broken down into probably 15 or 20 days.

Q. Do you have any typical size of shipment in terms of number of flats you would make to the Chicago marketing area?

A. Well, a truckload runs 1600 to 1700 flats and as I pointed out earlier, Chicago is one of the main distribution centers for Calavo and many times we ship to Chicago for instructions and the truck may go on to Detroit, on to [fol. 220] Minneapolis or something like that. So we mail 1600 flats to Calavo, Chicago, but maybe they are redistributed to many places.

Q. Does the South Florida Growers Association do any shipping by railroad carload?

A. No.

Q. Is the figure 1600 to 1700 flats per truck typical shipment to the Chicago market?

A. Yes.

Q. In a truckload of 1600 to 1700 flats, can you estimate how many groves contributed to that shipment?

A. No, that would be almost impossible to do.

Q. Would it be likely to be more than five groves?

A. On some days it might run five—on some other days maybe it would run two or three. When we know we are going to load a certain market area and we want a certain size of picked fruit, they are all out of one grove or maybe you would get two growers and pick all the fruit just for that particular size. We may pick for two days in order to get a certain variety to go to a certain market. Maybe one grove—I would say from one to five would be a fair estimate.

Q. Would it be true to say it is extremely unusual to have one grove contribute a truckload of 16 or 17 hundred flats?

A. I wouldn't say extremely, but I would say unusual, because I think conceivably we have had that many, but it is not usual.

[fol. 221] Q. Would it be true then to say at least 95% of your shipments would come from 10 groves or less where the shipment is 1600 or 1700 flats?

A. Yes.

Q. Does the South Florida Growers Association market under several labels?

A. Yes.

Q. Could you describe what the labels elaborate?

A. You mean the grade?

Q. Yes. That is the answer, that it is a grade. Would you explain what your label signifies in terms of grade?

A. At the present time we don't have them registered as certain grade labels. I believe it was just put through at the last meeting, or two, where all of the packing houses will have to register their labels for grade, but at the present time our label does not signify grade.

Q. Is it the practice of the South Florida Growers Association to pack premium packages, which would generally bring premium prices?

A. No.

Q. At the present time, the 1957-58 season, there has been in this season to date the one grade mark for the South Florida Growers Association?

A. Right.

Q. In previous years you shipped under different grades? [fol. 222] A. Yes, three or four years ago we shipped under different grades, but last year, or so, we shipped under one grade.

Q. Mr. Kendall, were you active in the industry in 1953 and 1954 in the sense of working towards the adoption by the industry of the Marketing Order?

A. I think I could be termed a reconstructed individual. The inception of the Marketing Agreement came from the Florida Growers, as a grass root movement and came from the Florida Growers, who with the impetus for trying to determine a more orderly procedure for setting maturity on grade and packing standards and, after the growers got the thing rolling, they applied to Washington. Then the packers came along and I have been active and gone along in trying to do what I could in helping the program, because I believe it to be a constructive program.

Q. At the time was there a referendum held in among the producers and handlers by which ballots as to whether they would be in favor of the issuance of a Marketing Order?

A. Yes.

Q. Did the South Florida Growers Association, Inc., vote in favor of the issuance of the Marketing Order?

Mr. Ferguson: That is not a proper question.

A. It is fair to say I voted for it. I believe it is a good program.

By Mr. Fourt:

Q. What was one of the considerations which led the South Florida Growers Association, Inc., in favor of the [fol. 223] issuance of a Marketing Order, the fact that the

handlers operating under the Marketing Order would be exempt from the Sherman Antitrust Act?

Mr. Ferguson: I don't know why you are asking these questions. It is part of the law. The law says so. I take it they did it because of all of the reasons stated in the law.

A. As a handler that wasn't given consideration. I haven't heard that thought mentioned. I believe the impetus came from the growers and handlers and we went along because we felt that this was a progressive step in the marketing of Florida avocados.

Mr. Fourt: I have no further questions.

By Mr. Norris:

Q. Do I understand correctly, Mr. Kendall, that prior to 1954-55 season neither the South Florida Growers Association or the Florida Growers Association, which was its predecessor in business, sold any avocados on the California market?

A. Right. I might add that it wasn't because I didn't want to sell them, it was because Calavo Growers of California have acted as my distributors on an exclusive basis at that time and distributed in the 47 other states and my competitors began to sell in the California market before the '54 season, so that put me at a competitive disadvantage. When the question was brought up, the sales department consulted with other parties and the Calavo Growers came to the realization that if other people were going to sell avocados in California, they were going to sell [fol. 224] Florida avocados in California.

They as a sales organization represented Florida organizations, I am one of three, and they decided they should be able to handle Florida avocados without prejudice of California avocados. But that wasn't done immediately, it was done after a great deal of consultation.

Q. Do you now market avocados in California exclusively through Calavo?

A. I think all of my sales to date have been made through Calavo in California. I hesitate, because there are other brokers in the state which make up mixed loads. They

might have bought some of my fruit and shipped it to California, but I have no real knowledge of it.

Q. You have had no direct sales to Safeway or Lucky Stores?

A. Only through Calavo for the California market. I believe I am safe in saying that, I'm not sure, but I believe I am safe in saying that.

Q. Was that part of your agreement with Calavo prior to 1954 that you would market avocados only through the Calavo organization?

A. I'm not sure at what time we had the exclusive arrangement with them.

Q. My question was: Did you have an agreement with Calavo or were you voluntarily using Calavo exclusively?

A. It was by agreement with Calavo.

[fol. 225] Q. Do you mean by that, if you had sold direct to a chain store in California during this period Calavo would have ceased to operate as your bargaining agent?

A. They threatened to do that.

Q. This is the reason you did not ship any avocados to California before 1954?

A. Right. I won't say this was on the basis of an exclusive arrangement in the California market only, it was through the rest of the United States also.

Q. Mr. Kendall, I refer you to Plaintiffs' Exhibit 18, Summary of Avocados Handled in the Calendar Years '54-55, '56-57, will you note that Exhibit 18 reflects that in 1956 season 15,055 bushels were sold in California. Would you consider that a normal or abnormal volume of sales in California by your organization?

A. I would say that if we were on restricted—

Q. That is not my question.

Mr. Ferguson: You asked him if it was normal.

Mr. Norris: His answer is in the form of hypothetical terms. He is talking about what he would have done, if we didn't have the present law in effect.

Mr. Ferguson: Your question is argumentative. You are asking him, if it is normal or abnormal.

Mr. Norris: That's correct, that's what I want to know.

Mr. Ferguson: You have no standard to know what is normal and what is subnormal.

[fol. 226] By Mr. Norris:

Q. The marketing condition under the existing law, would you consider that normal or abnormal?

A. Well, under the existing law whereby we are not able to ship any variety except the Lula until late in November, if I had full cooperation from the sales agents in California, I would say that was not abnormal.

You see, my figures, I think, are probably not typical necessarily of the industry in that respect, because there is a good deal of pressure and we recognize it at times, from the California avocado growers who use their own sales organizations in California. When that pressure is on, then they tend to put a little pressure on me possibly. I won't say to discourage me, but there isn't quite the opening in the California market there might be to their competitors who are not so bound.

Q. How do you account for the decrease in the volume between 1956 and 1957?

A. This year, I believe, we were retarded a great deal. Our oil content on the Lulas didn't come up to 8% until late. We weren't able to get rolling on this and get them in the chain stores merchandising our avocados and as a result they didn't get interested in them.

When a large merchandising organization gets interested in promoting a product it takes a certain time to get lined up. When they do get rolling, they roll right along pretty fast and this year because of the prices of California avo-[fol. 227] cados being lower so much earlier and our fruit was held back somewhat longer, we weren't able to get into the markets as easy as we have other years.

Q. Isn't it true that 1956 was a year of an unusually short crop of California avocados?

A. I am not sure about that. I do know 1957 looks like their heaviest crop.

Q. I asked about 1956.

A. I'm not sure it was unusual. It was lighter than the previous year or lighter than this year, but I don't know that it was unusually light.

Q. Would you say that the short crop in California is one of the principal reasons why your volume was so high in the 1956 season?

A. It might have contributed to a certain extent to that, because there was high prices out there and it was easier for us to get rolling and get the merchandising outlets interested in the fruit. When they found they sold so well, they kept on using them.

Q. Directing your attention to the '54-55 season, Mr. Kendall, did you ship any avocados to California in January of 1955, to the best of your knowledge?

A. I will have to look at that sheet (indicating).

(Examining document.)

Mr. Ferguson: January, 1955?

Mr. Norris: That's correct.

By Mr. Norris:

Q. Referring to Defendants' Exhibit "P"—

[fol. 228] A. I don't believe I shipped in 1955.

Q. Does Defendants' Exhibit "P" contain the ones rejected under the 8% oil content?

A. No, this indicates that some were rejected.

Q. But does it show all of the shipments?

A. I believe so.

Q. Isn't it true the Lula season continues through January, Mr. Kendall?

A. Lula shipping season—it can continue, but we can ship from the first part of October on. We have a longer marketing—

Q. Does it continue through January?

A. If we have the fruit available. We have tried to move our Lula avocados when we can move them to the best advantage.

Q. Do you know whether you were shipping Lula avocados in January of '55?

A. I am sure we carried all along.

Q. Did you then send any to California?

A. No, not according to that (indicating) record.

Q. Do you know why you did not send any Lulas to California in January of '55?

A. I don't recall, no.

Q. How about January of 1956?

A. That is on the same sheet. I don't find any shipments in January, 1956. I don't see any.

Q. Isn't it true that the oil content of the Lula variety [fol. 229] would be higher in January than in November, December, or October?

A. I'm not sure. I couldn't vouch for that. I think there were some Lulas that didn't pass the 8%.

Q. Did you ship any avocados, Lula or otherwise, in January, 1957?

A. January, 1957, yes. We sent four truckloads, according to this record here.

Q. You sent four truckloads. How many flats would that be? Let me restate that. How many bushels would it be since your figures are in flats?

A. Figuring four to one, it would be about 1600 bushels.

Q. In January of 1957.

A. According to that figure there.

Q. In other words, you shipped 1500 bushels of avocados to California in January of '57, and so far in the fall of '57 you shipped only 2,434 bushels to California, is that correct?

A. According to those figures there.

Mr. Ferguson: You took the equivalent of one load?

Mr. Norris: I believe he testified in January of '57 he shipped—

Mr. Ferguson: You figured four truckloads amount to 1500 bushels?

The Witness: Converting on a rough basis around 1600 or 1700 bushels for four truckloads converting on a four to [fol. 230] one basis. I figured 400 to 450 bushels to a truckload—it is a rough figure.

By Mr. Norris:

Q. Did you have any shipments in January of 1957 rejected under the 8% oil content standard?

A. No, the last rejection there was on November 29, I believe that year.

Q. Mr. Kendall, do you have any explanation why in January of '55 and January of '56 you sent no avocados to California, but in January of '57 you shipped approximately 1500 bushels to California?

A. No. We made shipments to California in January of '56.

Q. How many did you ship to California in January of '56?

A. In January of '56 there were three truckloads indicated here. Two on December 30 and three in January, January 4, January 19 and January 20, and December 30, 1955.

Q. Do you know what the volume was of those shipments?

A. Five truckloads—I would estimate it would amount to 2200 bushels.

Q. In January of '56?

A. Yes.

Q. Which month of the year is this California market most attractive to you as a Florida shipper?

A. It is most attractive whenever we can move fruit out there.

Q. I am asking which month or months of the year are the [fol. 231] most attractive for you to ship in there?

A. October, November and December.

Q. Why are those months more attractive than any other month?

A. Because those are the peak months of the year for Florida avocados and the lightest months of the year for California. It is just natural that our avocados would meet a better reception in the market areas when their customary supplies of avocados are very short.

Q. Mr. Kendall, you are well acquainted with the avocado market generally throughout the country, are you not?

A. Yes, pretty well.

Q. And you keep yourself fairly well informed of the market prices of avocados in various markets throughout the country?

A. Yes.

Q. You keep yourself informed of the prices of avocados in California as well as Florida avocados being sold at the same time?

A. Yes.

Q. Excluding both Florida and California, does the California avocado or the Florida avocado generally bring a higher price per pound on the market throughout the country?

A. Well, I can't really give a fair answer to that, until you raise the question as to what is in the pack being sold.

Q. Explain that answer.

[fol. 232] A. For example, a flat of California avocados might sell for $3 and have, say, 13 pounds in them. You have 13 and a half pounds for an average of 24 or 25 cents a pound, but that flat has 20 to 24— 20 to 26 fruit and has that many sales in it. That flat, taking that price for example, when it has in it 24 and costs 12½ cents and then retails for 17 cents.

Q. What do you mean by 24?

A. 24 counted fruit to the flat. In the same market a flat of Florida avocados—

Q. Were you just referring to the Florida avocados?

A. No, that was California. In the same market on a flat of Florida avocados, maybe they would sell for $2 and a flat which has 13½ to 14 probably 15 pounds net weight, which would be a lower price per pound, but that flat has only 12 sales in that and the fruit costs 17 to 18 cents and has to retail for a quarter or maybe 27 cents.

I think most everybody that merchandises produce or anything else will agree you make a lot more sales at 17 cents than you can or do at 25 cents, even though the fruit at 25 cents may be double that.

To a certain extent, there is a tendency to reduce the asking price of fruit of a large size. That is true not only of Florida avocados, but California avocados.

I think the records of some of the market places in the last year, for example, will show California avocados of a [fol. 233] certain size were selling at the same price per fruit. In other words, the 20 size California avocado was about the same price per flat, or pound, as the case may be, as the 20 size Florida avocado.

Q. You say this is true this year?

A. This past year.

Q. Do you think it is true of previous years?

A. I think we have already met on equal terms. You understand, we have standardized in Florida on the flat which is the same size flat as they have in California. Now, we standardized but at the same net weight. Our net weight is 13½. We pack at 13½ pounds. We standardized. We standardized 13½ net weight which was very similar to which the California avocado is packed and I think over the last year or two where they met in the market places they have tended to bring somewhat closer per fruit price, keeping in mind that our Florida avocado tend to be a good deal larger in size. In other words, we run anywhere from 14 to 20 ounces where the California avocado tend to average 6 to 12.

Q. You say when they are close the California avocados bring a higher price per pound?

A. I modified that by saying not all California avocados bring a higher price per pound than all Florida avocados. Some varieties have a heavy discount especially if they can't be classed as first grade.

[fol. 234] Q. Have you noticed any difference in prices between the comparable Florida avocado and comparable California avocado on the California market than throughout the rest of the country?

A. We haven't been given a chance to put the comparable sized fruit on the California market on time. I have a feeling that our Booth 8 avocado, that run the 20 and 24 size to the flat, would bring a very comparable price if we were allowed to market them on the market in the month of October.

Q. That is your opinion. I am asking actual market prices in California; in the example you used before you compared Florida No. 14's and California No. 24's?

A. That's right.

Q. You indicated that in marketing outside of California and Florida, the California avocado that a 24 would bring a higher price normally than a Florida 14. Would that price differential be greater in California than in the rest of the country?

A. No, not necessarily. Actually, I think that one of their difficulties this past year has been the fact that their

avocado haven't been running larger in size. In November, for example, their prices tended to come down.

Q. I ask you only as to the relative price differential between the 14 or 24, whether or not it likely would be greater in California than the rest of the country, excluding Florida.

A. It is pretty hard to measure that actually, because California ships very few comparable sized back East where [fol. 235] we could compare them with the 12 or 14 or 16 from Florida.

Q. Assuming that California is shipping the 24, and—this is the example you used previously—

A. Right.

Q. (Continuing) —you were comparing the price of the California 24 with the Florida 14 in the market outside of California and Florida—I want to take that same example and apply it to the California market and have you say whether the price differential is likely to be greater in California or in the rest of the country or less in California than the rest of the country?

A. I don't think the price differential is liable to be any greater there.

Q. I am making reference, Mr. Kendall, to Plaintiff's Exhibit No. 9 and the first 11 varieties enumerated on that page. Did you testify that they were all West Indian varieties?

A. I believe I did, yes.

Q. Now, is the marketing pattern for those West Indian varieties significantly different than the marketing pattern for the Hybrid than West Indian and Guatemalan Hybrids?

A. To a certain extent, it is.

Q. Did you tend to market more of the West Indian varieties in the home Florida market than throughout the rest of the country?

A. No, I think probably we marketed those varieties—at [fol. 236] the time we marketed those a good many of the varieties—the shipping pattern was an after effect of the Cuban avocado. We marked out certain markets. We didn't go in New York as heavily with the Pollocks and Waldins as we did in the other areas, such as Texas or possibly into the Middle West in a percentage way.

Q. Is there any difference in the ability of these West Indian varieties to withstand longer shipments than the ability of the Hybrid variety?

A. I would say on an average that our summer varieties do not keep as long as the later fall variety, but I have known of Waldin, for example, going over to Germany to the Army and we have had no complaint on them. We checked when they arrived over there.

Q. Did you fly them over?

A. We sent them up to New York by truck and reshipped by transport of some kind to Germany, and then I believe it was Brussels and reshipped around to various Army installations. We were particularly interested because we wanted to follow through on the Waldin variety and see how it had done, having been shipped that distance.

Q. Do you have any experience with the other 10 varieties comparable to that?

A. We didn't try to ship them that distance. We have shipped the Pollock to Texas and as far as the Middle West.

Q. Did you tend to have more difficulty with these shipments of West Indian variety to distant points more than other varieties?

[fol. 237] A. I could say we tend to have more difficulty, because at the time of the year when they are shipped it is hotter and they ripen a little faster.

Q. During shipment?

A. No, if it is kept under refrigeration it will hold up. But in the various market places they tend to ripen faster.

Mr. Fourt: Mr. Ferguson, I wonder if we could interrupt out of order and have this piece of paper marked next in order.

Mr. Reporter, I hand you a piece of lined paper marked at the top "California Avocado Shipments, 1955-56 Season" and ask it be marked Defendants' Exhibit "R".

By Mr. Fourt:

Q. I show you, Mr. Kendall, what has been marked Defendants' Exhibit "R" for identification and ask you to identify this document.

A. This is a lined paper entitled "California Avocado Shipments, 1955-56 Season."

I might mention that these exhibits—these pieces of paper were not prepared with the idea of having them marked as an exhibit. I originally referred to them only to refresh my memory as to the original date of shipment to California. I am not sure that they are in the proper order or that they are exactly complete. In some cases they—these are notes and they were prepared just for note purposes.

Q. Mr. Kendall, in order that there might be no mistake, would you say to the best of your knowledge that Defen- [fol. 238] dants' Exhibits "P", "Q", and "R" represent shipments made by the South Florida Growers Association from Florida to California through the years 1954 through 1957?

A. I believe that these exhibits "P", "Q", and "R", are tabulated shipments which we made to—which South Florida Growers Association, made to California during these four shipping seasons. However, as I have said before, they weren't prepared with the idea of being an exhibit. I prepared them as notes to refresh my recollection as to the original starting dates and that is all.

Mr. Ferguson: This is four seasons or three seasons?

The Witness: That is, I believe, four seasons there.

By Mr. Norris:

Q. Mr. Kendall, does the fiscal year of your corporation—when does it end?

A. We end March 31. I believe that is when the Administrative Committee's fiscal year is. Naturally, you are making the point we don't ship any fruit after March 31.

Q. So all gross receipts of your corporation for the '56 and '57 season would be reflected in the fiscal year accounting ending March 31, 1957?

A. Yes.

Q. Do you know what the gross receipts of your corporation for the fiscal year ending March 31, 1957, were?

A. I haven't the slightest idea.

Mr. Ferguson: I object to any such question.

The witness has already stated that avocados are only [fol. 239] part of his business and the entire question is irrelevant and immaterial.

Mr. Norris: Well, we consider it highly relevant and a material line of inquiry, Mr. Ferguson, and this is the first of a number of questions relating to the financial position of the South Florida Growers Association.

Mr. Ferguson: I don't think the financial condition of this corporation is within the issues of this case.

I don't think the Court would ever request the witness to answer such a question. You can put it up to the Court, but I am going to suggest to the witness he answer no such question.

Mr. Norris: Then we are going to have to put it up to the Court. Perhaps because of the long distance involved—

Mr. Ferguson: It doesn't make any difference.

Mr. Norris: This line of questioning can easily be handled by written interrogatory. We can apply to the Court for an order, if this is going to be the way you insist on—

Mr. Ferguson: In the broad day light if you have any such idea, you can try it. The Court would not let you pry into the business of this corporation which is in no way involved in this case, other than to the extent to which it is involved within the issues here.

Mr. Norris: I am going to want to know the gross receipts of this corporation during the 54-55 season; 55-56 season; 56-57 season. The gross receipts of all shipments [fol. 240] from all sales of avocados in Florida—in California, correct that (referring to Reporter) during those same years.

We are going to want to know the net worth of the corporation as of March 31, 1957.

We are going to want to know the gross receipts of the South Florida Growers Association from all sales of avocados, not only the gross receipts of the sale. in California for those same years.

Now, can we stipulate that these questions were asked and the witness refused to answer on advice of counsel?

Mr. Ferguson: I certainly am mixed up. You started by putting a lot of things in here—something about the whole business of the corporation and then you injected something about avocados. As far as I can get it, what you are asking about his avocados is for dollar figures, instead of volume figures.

I don't know what you are asking now, to tell the truth. You have shifted ground and I certainly feel it is an imposition to ask this witness about the net worth of his corporation or the net results of the entire operation of the corporation and whether your question about the sales of avocados are in any way relevant. I don't know, because of the many confused statements you have made.

Mr. Norris: I will ask each question separately and then he can make it clear he is refusing to answer.

By Mr. Norris:

Q. What was the net worth of your corporation as of [fol. 241] the close of the last fiscal year, March 31, 1957?

Mr. Ferguson: We have already disposed of that one.

Mr. Norris: I am going to ask each one separately so that the record will show it clearly.

Mr. Ferguson: I am advising the witness that it is not a proper question, and that he is not called upon to answer it unless the Court so instructs him.

Mr. Norris: Can we stipulate then that the Commissioner asked the witness the questions again and that he refused to answer under the advice of counsel?

Mr. Ferguson: You can consider that done.

By Mr. Norris:

Q. What was the net worth of your corporation as of December 31, 1957?

Mr. Ferguson: Same objection.

Mr. Norris: The same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for the fiscal year ending March 31, 1957?

Mr. Ferguson: The same objection for the reasons previously indicated, and for another reason that the business of the corporation is not only that of handling avocados.

Mr. Norris: The same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation [fol. 242] from all activities from April 1, 1957 to December 31, 1957?

Mr. Ferguson: The same objection. That is the same question.

Mr. Norris: It is a different kind of question, Mr. Ferguson.

Mr. Ferguson: I interpose the same objection.

Mr. Norris: With the same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for all activities for the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection.

Mr. Norris: Same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts of your corporation for the fiscal year ending March 31, 1955?

Mr. Ferguson: Same objection.

Mr. Norris: Same stipulation?

Mr. Ferguson: Yes.

By Mr. Norris:

Q. What were the gross receipts from the sale of all avocados by the corporation during the period April 1, 1957, to December 31, 1957?

Mr. Ferguson: The same objection. The question is irrelevant and immaterial. You may have the same stipu- [fol. 243] lation as to the putting of the questions to the witness.

By Mr. Norris:

Q. What were the gross receipts of your corporation from the sale of all avocados during the fiscal year ending March 31, 1957?

Mr. Ferguson: Same objection. Same stipulation.

Q. What were the gross receipts from the sale of all avocados by your corporation for the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection, and same disposition of the question.

Mr. Norris: You mean the same stipulation?

Mr. Ferguson: That is what I meant by that.

Q. What were the gross receipts from the sale of all avocados by your corporation for the fiscal year ending March 31, 1955?

Mr. Ferguson: The same objection. You have already asked him that.

Mr. Norris: I haven't asked him that specifically for that specific date.

Mr. Ferguson: Then maybe it was for a different date.

Q. What were the gross receipts from the sale of avocados in California for the period from April 1, 1957, to December 31, 1957?

Mr. Ferguson: Same objection. It is irrelevant and immaterial.

Q. What were the gross receipts from the sale of avo- [fol. 244] cados in California by your corporation during the fiscal year ending March 31, 1957?

Mr. Ferguson: What is the difference between the two questions?

Mr. Norris: The period of time is all.

Mr. Ferguson: The same objection, with the same stipulation.

By Mr. Norris:

Q. What were the gross receipts from the sale of avocados in California by your corporation during the fiscal year ending March 31, 1956?

Mr. Ferguson: Same objection.
Mr. Norris: Same stipulation?
Mr. Ferguson: Yes.

Q. What were the gross receipts from the sale of avocados in California by your corporation during the fiscal year ending March 31, 1955?

Mr. Ferguson: Same objection.
Mr. Norris: May we have the same stipulation?
Mr. Ferguson: Yes.
Mr. Norris: No further questions.

Redirect examination.

By Mr. Ferguson:

Q. Were oil tests ever required for any purpose under the marketing agreement governing your handling of avocados?

A. No.

[fol. 245] Q. Were any oil tests ever requested by you in contemplation of a lawsuit to challenge the validity of the California oil content law?

A. No. The only reason that we had the oil tests made was to ascertain the degree of oil content of fruit which we hoped we would be able to ship to California. We were trying to find these groves and these fruits that would run the highest oil content so that we could make shipments out as early as possible.

Q. Was the Florida crop in the 1956-57 season a relatively large crop or a small crop?

A. It was a lighter crop than the previous year and lighter than this year.

Q. Were there some conditions of weather which adversely affected the crop?

A. Yes, we had a freeze on January 15 or 16, 1956, which affected the size of our crop, reducing it by around 25% of the previous year, and probably about the same amount compared with this year, so it was at least 25% less in the volume of crop than the previous year or the succeeding year.

Q. Were there any other weather conditions that affected that crop?

A. Some of our crops had storm damage. For instance, Mr. Krome had 1600 trees uprooted in that particular storm that occurred in March of that year, which reduced the expected volume of the crop.

[fol. 246] Q. Were there any special conditions with respect to pests?

A. I believe it was in the spring of 1956 that the Mediterranean fruit fly was discovered in Florida, and that affected our distribution pattern somewhat, I believe.

Q. When you make a shipment of avocados to California, which is rejected, what can you do, if anything, to recondition the load?

A. Frankly, sir, I don't know just what procedure is followed to recondition the load. We are really perplexed as to what it is that makes an 8% oil content avocado go bad. It is very difficult to even guess as to the external characteristics of avocados, whether it is a Lula or a Booth 8. I don't know what a person in California could do to recondition our shipments.

Q. In such cases, do you have available in California other Florida avocados to substitute for avocados in the rejected loads?

A. No. I consider that at all times we have been very conservative in our shipments of fruit to California, because we haven't wanted too much fruit rolling at any one time, so that it would run into the difficulty of being rejected and then having to get it on to these other markets. When you get three or four trucks of avocados rolling at the same time, there is that possibility and naturally we worry until they arrive and are accepted.

Q. You have had experience in California as well as in Florida. From your experience and general knowledge of marketing conditions, what would you say is the relative [fol. 247] position of the California market in avocados as compared with the rest of the country?

A. The demand for avocados in toto is considerably greater in California than it is in many other parts of the country. I would say that is probably due to the fact that the people out there probably use more salads and use more avocados in general than they do in other parts of the country.

Q. Is there a Mexican influence?

A. Yes. Just as we found in New York City, one of our biggest demands for avocados comes from the pushcart area of Harlem. The original demand in California for avocados started with the Mexican influence, and I believe that it has continued.

Q. Under the Federal regulations governing maturity of Florida avocados, is there a percentage of tolerance in the weight or size standards?

A. I believe there is. I am not sure as to the percentage. It may be 5%, but I am not exactly sure what that percentage is. I believe there is a small tolerance.

Recross examination.

By Mr. Fourt:

Q. During the year 1957-58 marketing season, as it is known in Florida, what months during that period were the most attractive for the marketing of Florida avocados in California?

Mr. Ferguson: You have already asked him that same question, precisely that same question.

A. I think my answer to that question before was that [fol. 248] the months of October and November and December would be the most attractive because that is the peak of our shipping season for Florida avocados.

Mr. Fourt: May it be stipulated by and between plaintiffs of record in this action and the defendants, Jacobsen, Knight and Brown, that if the same questions propounded by Mr. Norris to Mr. Kendall were asked by the defendants just named, that in response to each question Mr. Kendall declined to answer on the advice of counsel, and that the Commissioner then directed the witness to answer

the question, and the witness declined to answer such questions on the advice of counsel?

Mr. Ferguson: It is so stipulated.

Mr. Fourt: Thank you.

And further deponent saith not.

[fol. 249] Fred Piowaty a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ferguson:

Q. Your name is Mr. Fred Piowaty?

A. Yes.

Q. Where do you live, Mr. Piowaty?

A. Coral Gables, Florida.

Q. Where is your place of business?

A. Princeton, Florida.

Q. What is your business?

A. Packing, shipping and selling limes, avocados, mangos, tomatoes and potatoes.

Q. Are you an officer of Florida Lime and Avocado Growers, Inc.?

A. Yes, sir.

Q. And what is your office in that corporation?

A. Secretary.

Q. Are you active in the management?

A. I am the sales manager.

Q. When was the corporation organized?

A. 1956.

Q. Did it then succeed a prior business?

A. It succeeded a cooperative.

[fol. 250] Q. Of the same name?

A. Not the same name, but the same nature of business.

Q. How long did it operate?

A. Since 1939.

Q. Were you active in that business at all times since 1939?

A. No, sir; only since 1943.

Q. That was the beginning of your activity in the avocado industry of Florida?

A. Yes.

Q. What did you do prior to that; what was your prior business?

A. I was in the purchasing business, operating out of Chicago. I was in the jobbing end of it and also in the buying end of it on the road, from 1934.

Q. Is the business of Florida Lime and Avocado Growers, Inc., that of growing avocados?

A. Yes.

Q. To what extent?

A. We maintain a complete grove maintenance setup for growers, besides owning some groves, handling the care and maintenance all the way from planting through to harvesting.

Q. Do you operate groves completely for others?

A. We do.

Q. Does the company own any groves?

A. We own two groves at the present time.

[fol. 251] Q. What acreage?

A. 40 acres.

Q. You refer to avocado groves?

A. Yes.

Q. And what does the corporation operate in the way of avocado groves as lessee?

A. About 125 acres.

Q. Did your company make a shipment of avocados to California on November 15, 1957?

A. Yes.

Q. Was this load of avocados inspected by the Federal-State Inspection Service of Florida?

A. Yes.

Q. Where was that inspection made?

A. In our packing house.

Q. After that inspection did you receive an inspection certificate?

A. Yes.

Q. I show you an inspection certificate marked Plaintiffs' Exhibit 3 for identification. Did you receive this particular copy?

A. I received a copy of this particular inspection certificate.

Q. Do you know what happened to that copy?

A. This went with the truck to California, I believe.

[fol. 252] Q. And did I bring it back to you from Los Angeles, California?

A. You did, sir.

Q. Mr. Piowaty, have you prepared a summarized statement from the accounting records of your corporation of the volume of avocados sold by your corporation in the 1954-55 and subsequent selling seasons?

A. Yes.

Mr. Ferguson: Mr. Reporter, please mark this page as Plaintiffs' Exhibit 20 for identification.

(Off-the-record discussion.)

Mr. Ferguson: During the off-the-record discussion the witness suggested an amendment to the answer to state that the seasons covered 1955-56 and subsequent seasons.

Q. Do you keep a record of sales by states?

A. Yes, sir.

Q. Is that a ledger record?

A. Yes.

Q. Is that available here at this hearing?

A. Yes.

Q. In what states did your company make sales of avocados in the years since 1954?

A. Practically every state in the Union. I won't say every state in the Union, because I didn't make any in Vermont that I know of. We probably did have some go [fol. 253] through there from Boston, but not any sent directly there from Florida.

Q. Does this statement show truly the volume of sales of avocados by your company in the three seasons here listed, beginning 1955-56, including the present uncompleted season?

A. Yes, to January 10 of this year.

Q. Does it also show distribution of sales in the three classifications "Sales in Florida", "Sales in California" and "Sales in Other States"?

A. It does.

Q. Does this truly reflect the data in the books and records of your company of the sales?

A. Yes, sir.

Mr. Ferguson: This statement will be offered in evidence as Plaintiffs' Exhibit 20.

Q. Are all of the avocados sold by your company grown in South Florida?

A. Yes, sir.

Q. Are they all marketed under the Federal Marketing Agreement No. 121?

A. Yes.

Q. Did your company make shipments of avocados to California in the four seasons, beginning 1954-1955?

A. Yes.

Q. Is there any reason why the 1954-55 sales are not included in this tabulation marked Plaintiffs' Exhibit 20 for [fol. 254] identification?

A. Primarily, because of the fact that the total volume of sales was rather difficult to pick up, and it would take a lot more work. The California sales would not be hard to find, but the total sales for a particular season would be hard to find.

Q. I think part of my question was whether your company made shipments of avocados to California in each of the four seasons.

A. Yes.

Q. Prior to the time of these shipments, did you obtain oil content tests of avocados by the University of Florida Subtropical Experiment Station at Homestead?

A. Prior to shipping to California?

Q. Yes.

A. No, if I understand the question correctly.

Mr. Ferguson: Will the Reporter repeat the question?

(Preceding question read by the Reporter, as above recorded.)

A. Does your question mean prior to our shipping to California?

Q. Yes.

A. Yes, we took tests.

Q. I direct your attention to an exhibit marked Plaintiffs' Exhibit 12 for identification and ask you to examine the list of oil tests which appear in that exhibit, and tell us, if you can, whether these oil tests were made on application of your company?

A. They were.

[fol. 255] Q. Why did you procure these oil tests?

A. For the purpose of seeing if the avocados were running high enough so that we could take a chance on shipping them to California.

Q. Did you in any instance procure an oil test of avocados for any other purpose?

A. No.

Q. Were some of your shipments of avocados to California barred from sale in that state?

A. Yes.

Q. Have you prepared a summarized statement from the books and records of your company of the transactions in which avocados shipped to California were barred from sale in that state?

A. Yes, sir.

Mr. Ferguson: Will the Reporter please mark this statement, consisting of two pages, entitled "Florida Lime and Avocado Growers, Inc.—Avocado Shipments Barred from Sale in California", as Plaintiffs' Exhibit No. 21 for identification.

Q. Do you have with you here a complete file of your company on the five transactions listed in Plaintiffs' Exhibit 21 for identification?

A. Yes.

Q. Does that include a document showing the sale of the avocados in each instance?

A. Yes.

[fol. 256] Q. Together with the bill of lading?

A. Yes.

Q. And a statement of account received from the California customer?

A. Yes.

Q. With notification of the rejection of all or part of a load, and a reason for the rejection?

A. Yes.

Q. Does it include in each instance a copy of the certificate of inspection received by you from the Federal-State Inspection Service in Florida?

A. All but the one of December 8. I was unable to get that from Orlando.

Q. Did you find whether or not you had copies of the certificates in your company files?

A. No. I had to secure copies from Orlando.

Q. You secured copies of the certificates of inspection from Orlando?

A. Yes.

Q. Based on the files and books of account of your company, is this statement of transactions, Plaintiffs' Exhibit 21 for identification, true and correct?

A. Yes.

Mr. Ferguson: This statement will be offered in evidence as Plaintiffs' Exhibit 21.

[fol. 257] Q. To whom was the last of these shipments made?

A. To Felix Cohen and Son, Oakland, California, and Williams and Son Produce Company, Los Angeles.

Q. Was it divided between them?

A. It was a divided shipment, yes.

Q. Are these commission houses in California?

A. Yes, sir.

Q. Where is Williams and Son located?

A. In Los Angeles.

Q. And where is Felix Cohen and Son located?

A. Oakland, California.

Q. How many boxes were there in their shipments?

A. 1874.

Q. Can you say what that means?

A. It means 1874 lugs of avocados, running thirteen and a half pounds net minimum.

Q. Generally, Mr. Piowaty, is there a relationship between the size of the truckload and the distance of the shipment?

A. No.

Q. The question is whether there is a difference in the case of shipments to remote points and shipments to close points?

A. To remote points we would necessarily ship full-loads, whereas to a close-in point, you don't ship a full load; in other words, you make partial shipments.

Q. Do you know what part of this particular load was [fol. 258] unloaded at Los Angeles?

A. 900 lugs.

Q. What happened to the balance of the load?

A. 974 lugs went to Oakland, California.

Q. Your statement indicates, does it not, what happened to the 900 lugs of avocados that were rejected in Los Angeles?

A. Yes. 361 of them were rejected because of oil.

Q. And this statement shows the disposition of those 361 lugs?

A. Yes.

Mr. Ferguson: Will the Reporter mark this notice of Standardization Violation Report issued by the Los Angeles County Agricultural Commissioner, Standardization Division, as Plaintiffs' Exhibit 22 for identification.

Q. Was this copy of notice, Plaintiffs' Exhibit 22 for identification, procured for you by your consignee in Los Angeles?

A. Yes.

Q. Does it contain a memorandum of the results of the oil test of these avocados?

A. Yes.

Mr. Ferguson: This notice will be offered in evidence as Plaintiffs' Exhibit 22.

Q. Did the 900 boxes unloaded at Los Angeles contain avocados of different sizes?

A. Yes.

[fol. 259] Q. What sizes?

A. 10's, 12's, 14's, 16's and 18's.

Q. I think it has already been explained that that means the number of avocados in a box?

A. Yes.

Q. Does this notice indicate that a separate test of oil content was made as to the 14's, 18's and 16's?

A. Yes, it does.

Q. The 12's are not mentioned in this notice, are they?

A. That is right.

Q. Were the 12's and 14's sold in Los Angeles?

A. Yes, and one box of 10's.

Q. There was one box of 10's?

A. Yes.

Q. And the 16's and 18's were sold where?

A. Phoenix, Arizona.

Q. What about the balance of the load?

A. 974 boxes went to Oakland.

Q. Were they sold in California?

A. Yes.

Q. When you made your shipments of avocados to California in November, 1955, what was your understanding or expectation as to the manner in which the avocados would be tested for oil content, that is to say, as to the technical method as to whether they would be tested individually or by composite sample?

[fol. 260] A. In the 1954-55 year they were all tested as a composite deal.

Q. That was your understanding?

A. That was my understanding as of that time. In 1955-56 they took individual tests.

Q. And you had not anticipated that?

A. No.

Q. Were all of the tests procured by you, at the Experiment Station, tests of a composite sample?

A. That is right.

Mr. Ferguson: You may cross-examine.

Cross-examination.

By Mr. Fourt:

Q. Mr. Piowaty, am I pronouncing your name correctly?

A. Well, if it would make it easier for you or if it would make you happier, you can just call me Fred.

Q. When did your corporation build its present packing house in Florida?

A. The packing house was built in 1951. The one before that burned down.

Q. Where is the packing house located?

A. Princeton, Florida.

Q. How long has Florida Lime and Avocado Growers, Inc. been marketing avocados in California?

A. I think since 1954. It may have been in 1953, but I [fol. 261] don't know exactly.

Q. Did your predecessor Cooperative corporation market any avocados in California?

A. That was the predecessor.

Q. When did Florida Lime and Avocado Growers, Inc. become formed or organized?

A. It was originally organized as a cooperative in 1939, and we changed to our present corporation in 1956, therefore, you will have to differentiate as to which company you are asking about.

Q. Then it would have been the Cooperative which would have marketed avocados in California in 1953 to the time of the organization of the present corporation in 1956?

A. Yes.

Q. I show you Plaintiffs' Exhibit 20 for identification and ask you if you can supply the defendants with a figure as to sales in Florida for the year 1954-55?

A. It would be rather difficult to do that. I don't know whether I can do that or not.

Q. Would it be possible for you to obtain the sales in California by Florida Lime and Avocados Growers, Inc. for 1954-55?

A. Yes.

Q. Would it be possible for you to obtain the sales in other states for that year?

A. Yes, I can get that.

[fol. 262] Mr. Fourt: Mr. Ferguson, would it be possible to stipulate that a new exhibit exactly like Plaintiffs' Exhibit 20 for identification be filed with a new number, and that said exhibit contain these other figures?

Mr. Ferguson: It may be stipulated that an exhibit to be numbered Plaintiffs' Exhibit 23 will be prepared showing

total sales for the season 1954-55, and sales in California during that season.

By Mr. Fourt:

Q. Mr. Piowaty, would it be possible to obtain the total volume of sales in California for the season 1953-54?

A. No.

Q. The reason for that is that the records are in such a shape that you can't extract such information?

A. That is right.

Q. Is it true that there are three principal handlers by volume which market Florida avocados in California?

A. I don't know. I only know of two. There probably may be five.

Q. The two of which you are aware are the plaintiffs in this case?

A. That is right.

Q. Mr. Piowaty, may I see the supporting documents for these five transactions listed in Plaintiffs' Exhibit 21 for identification?

[fol. 263] Mr. Ferguson: Mr. Reporter, please note in the record that the witness has handed documents to counsel in reponse to his request.

By Mr. Fourt:

Q. Do you have a copy of Plaintiffs' Exhibit 21 for identification in front of you?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the top paragraph which reads, "November 10, 1955", could you tell us why Salt Lake City was selected as the market for the lot after it was rejected in California?

A. Yes.

Q. Why was Salt Lake City selected?

A. It wasn't too far away from Oakland, California.

Q. I show you one of the supporting documents and ask you if E. O. Muir did not write you concerning this shipment and state that the sizes in the lot were not the right sizes for Salt Lake City?

A. That is right.

Q. Isn't it true then that there were other adjacent markets which would have been a better destination for this reconsigned lot?

A. No.

Mr. Ferguson: It wasn't consigned, in the first place; it was a direct sale to Safeway Stores in the first instance. [fol. 264] Q. From Oakland it was reshipped rather than reconsigned to Salt Lake City?

A. That is right.

Q. With respect to the five shipments shown on Plaintiffs' Exhibit 21 for identification, were each of the five shipments consigned to consignees on the West Coast?

A. No, sir.

Q. Were one or more or can you identify any of them that were consigned to consignees on the West Coast?

A. Two of them were; the one on December 8, 1955, and the one on November 18, 1957.

Q. And those two shipments appear on page 2 of Plaintiffs' Exhibit 21 for identification?

A. Yes.

Q. With respect to the item of loss on page 1 of Plaintiffs' Exhibit 21, dated November 10, 1955, the figure being $1,377.05—isn't it a fact that that figure means that it was arrived at by subtracting it from the gross sales which you would have realized had this lot not been rejected in California?

A. No.

Q. Just what does that figure represent?

A. A definite loss.

Q. At this time is it possible for you to state your actual net gain or loss on that shipment, not with respect to potential profit or total receipts, but as to the actual net [fol. 265] gain or loss to Florida Lime and Avocado Growers, Inc. on that shipment?

A. The actual net loss to Florida Lime and Avocado Growers, Inc. on that shipment was $1,377.05.

Q. Do you know the actual cost to Florida Lime and Avocado Growers, Inc. of placing that shipment of 1129 lugs in Safeway Stores, including all costs?

A. Yes.

Q. How much was that cost?

A. $2,088.65.

Q. Isn't it true that the figure you just stated a moment ago would also have been your contract sales price had the sale been effected in California?

A. That is right.

Q. I direct your attention to Plaintiffs' Exhibit 21 for identification, with specific reference to November 12, 1955, the figure there appearing being listed as $2,170.54.

A. That is right.

Q. Was that figure calculated by subtracting your actual receipts on that shipment from the contract sum that you would have received had the lot been accepted in California?

A. Correct.

Q. What were the total costs to Florida Lime and Avocado Growers, Inc. in placing that shipment in Oakland, California?

A. $3,853.55.

Q. Is it true that the latter figure you stated also rep- [fol. 266] resented the sales price which would have been effected had the sale been consummated?

A. That is right.

Q. Directing your attention to the entry of November 14, 1955, on Plaintiffs' Exhibit 21 for identification, being the figure of $2,296.60, which is noted as a loss, isn't that calculated by subtracting your actual receipts from the marketing of this lot from the potential receipts you would have received had the sale been consummated in California?

A. Right.

Q. What was the total cost to Florida Lime and Avocado Growers, Inc. in placing that lot of avocados in Oakland, California?

A. $4,084.80.

Q. Does this latter figure represent the sales price which you would have received had the sale been consummated?

A. That is right.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, page [illegible] thereof, with particular reference to the shipment dated December 8, 1955—was the item denoted loss with the figures $1,651.82 calculated by subtracting the actual receipts from the sale of that lot from the figure which the corporation would have received had the sale been consummated in California?

A. That sale was a consignment, and that figure of $2,200 [fol. 267] is based on the market at the time the shipment arrived.

Q. The figure of $2,200 is not the contract price?

A. No.

Q. Is it true that you had no contractual arrangement with a buyer in California which would have guaranteed to you the price of $2,200, had that lot been sold in California?

A. We had assurance of that, but we had no contract.

Q. The assurance was given to you by your consignee in California?

A. By my representative in California with respect to this partigular transaction.

Q. Was the price quoted there "$2 per lug" and "$4 per bruce" based upon market quotations appearing in some state or Federal Price Quotation?

A. No.

Q. How did you arrive at these figures?

A. In a telephone conversation with a receiver as to what the market was and what he was selling them for at that particular time.

Q. I direct your attention now to Plaintiffs' Exhibit 12 for identification. Did you personally deliver the samples shown on the first page of Plaintiffs' Exhibit 12 for identification to the Experiment Station at Homestead, Florida?

A. No.

Q. Did you personally pick the samples which are indi- [fol. 268] cated on page 1 of Plaintiffs' Exhibit 12 under the heading "Size of Sample"?

A. No.

Q. With respect to pages 2, 3 and 4 of Plaintiffs' Exhibit 12 for identification, which refer to the 1956-57 season, the 1955-56 season and the 1954-55 season, did you personally deliver any of the samples tabulated on these pages to the Experiment Station at Homestead?

A. No.

Q. Did you personally deliver any of the samples tabulated on these three pages to the Experiment Station at Homestead?

A. No.

Q. Out of an abundance of precaution, Mr. Piowaty, did you personally deliver any of the samples which are tabulated on any of the four pages comprising Plaintiffs' Exhibit 12 for identification to the Homestead Experiment Station?

A. No.

Q. Did you personally pick any of the samples from trees as shown on the four pages of Plaintiffs' Exhibit 12 for identification?

A. No.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the shipments dated November 10, 1955, November 12, 1955, and November 14, 1955, had you given any specific instructions to the [fol. 269] consignees of these shipments with respect to reconditioning the lots in the event of their rejection or the rejection of parts of these lots by the State of California?

A. From others I have found out that there is no profitable way to recondition Florida avocados.

Q. And is it true that your answer would be no for that reason?

A. Yes.

Q. Directing your attention to Plaintiffs' Exhibit 21 for identification, with particular reference to the date of November 10, 1955, will you convert the figure "1129 lugs" into bushels?

A. Could I?

Q. Yes.

A. That would be simply a mathematical calculation.

Q. Then the answer would be that it is just a mathematical calculation?

A. Yes.

Q. Could the same mathematical calculation be applied to the other figures shown on the same exhibit for the number of lugs shipped on the dates of November 12, 1955 and November 14, 1955?

A. Yes.

Q. Directing your attention to page 2 of Plaintiffs' Ex-

hibit 21 for identification, would the same conversion figure apply?

A. Yes, the same conversion figure would apply on the lugs.

[fol. 270] Q. Does the conversion figure of 3.6 apply to the 700 lugs shipped on December 8, 1955 and to the 1874 lugs shipped on November 15, 1957?

A. The conversion applies to the lugs, yes.

Q. The conversion figure would translate the lugs to bushels?

A. Yes.

Q. Would the conversion figure for the "200 bruce" boxes shipped on December 8, 1955, as shown on this same exhibit, apply?

A. A "bruce box" is four-fifths of a whole. You would divide it by five and multiply it by four, which would be 160 bushels for the 200 bruce figure.

Q. Directing your attention to Plaintiffs' Exhibit 20 for identification, do you have with you the supporting data from which these tabulations were made?

A. I have with me the supporting data for 1955-56.

Q. May we see that document, please?

(Hands document to counsel.)

Mr. Ferguson: Let the record indicate that the witness has handed a ledger book to counsel.

[fol. 271] By Mr. Fourt:

Q. Mr. Piowaty, would you prepare the tabulation showing the date of shipment to California of the amount of lugs shipped or bushels, depending on your appropriate figures shown in your books, the figures of gross sales for the years or shipping seasons 1954-55; '55-56; '56-57; '57-58 to date, or the most recent convenient date depending on the records?

A. To California only?

Q. Shipments destined for California. In Plaintiffs' Exhibit 20 it shows January 10, 1958. Would your tabulation include shipments up and including January 10, 1958?

A. Yes.

Mr. Ferguson: Since we are giving you the sales in California for '54-55, there would be nothing added by this Plaintiffs' Exhibit 23, except as to the total sales in '54.

Mr. Fourt: That is correct. If the same figures are available, there should be no extra effort in including them.

Mr. Ferguson: Let's put it this way. We can forget about Plaintiffs' Exhibit 23, it is only one figure.

You have your shipments to California by date, and amounts in each season, and all of the shipments at the bottom of that exhibit, total sales 1954-55 and the figure.

Mr. Fourt: That will be satisfactory.

Mr. Ferguson: Are you just asking for them on these California shipments as to date and amount of shipments? There was something said before about preparing an ex-
[fol. 272] hibit to be numbered Plaintiffs' Exhibit 23. I am going to ask you to delete that.

Mr. Norris: Mr. Ferguson, I believe that probably did include some information this would not. That is the total volume of sales in all states for the years '54-55 and '53-54.

The Witness: I didn't get it. The '53-54 I said I couldn't.

Mr. Ferguson: He said he couldn't give you a total in Florida, but he could give you one in California.

The Notary: The proposed exhibit will be marked, when it is presented, Defendants' Exhibit "S" for identification.

(Thereupon, an off-the-record discussion was had.)

Mr. Fourt: It is stipulated between the defendants and plaintiffs that each of the questions posed by Mr. Norris to Mr. Kendall to which Mr. Kendall refused to answer may be deemed to have been directed to Mr. Piowaty by myself and that in each case Mr. Piowaty declined to answer on advice of counsel, and that the Commissioner in each case directed the witness to answer the questions. He still declined on the advice of counsel.

Mr. Ferguson: I would suggest that you state that the questions were put to Mr. Kendall with reference to one corporation and the questions would be put to Mr. Piowaty with respect to the Florida Lime and Avocado Growers Association.

Mr. Fourt: Our two stipulations will constitute one

stipulation regarding this matter of posing of the questions and refusal to answer.

[fol. 273] Mr. Ferguson: It is so stipulated.

Mr. Fourt: May the stipulation be extended to that question posed by Mr. William Norris to Mr. Piowaty in the same manner as the stipulation refers to the questions posed by myself?

Mr. Ferguson: Yes.

By Mr. Fourt:

Q. Mr. Piowaty, I should like to direct your attention to Plaintiffs' Exhibit 21 for identification and ask you if the five shipments shown on that exhibit, dated from November 10, 1955, to November 15, 1957, constitute all of the shipments from the Florida Lime and Avocado Growers shipped to California which were rejected at their inspection at California between the dates I just mentioned?

A. November 10, 1955, to November 15, 1957, no, they do not.

By Mr. Norris:

Q. I believe you testified that Florida Lime and Avocado Growers first shipped avocados to California in the '53-54 season?

A. I think so. I know in '54-55—I'm not positive about '53-54.

Q. I see. If any shipments were made during the '53-54 season, were they made without your having previously requested the Homestead Experiment Station to run oil tests on the fruit?

A. If I didn't request an oil content test, they weren't shipped to California. That can answer your question.

Mr. Norris: That is all the questions I have.

By Mr. Fourt:

Q. At any time since either the present corporation, the [fol. 274] Florida Lime and Avocado Growers, or the proceeding cooperative corporation has been shipping and marketing Florida avocados in California, has either of

those two organizations maintained oil testing equipment at your packing house?

A. No.

Mr. Fourt: No further questions.

Redirect examination.

By Mr. Ferguson:

Q. Mr. Piowaty, you just stated that Plaintiffs' Exhibit No. 21 does not include all shipments of avocados made by your company to California which were rejected upon oil test. Why does this exhibit fail to include any other rejected shipments?

A. We had quite a few more shipments rejected in California than these show. We went back to try to dig them out accurately and they are too hard to identify. Rather than include an inaccurate statement they weren't included in the record. They are still too hard to identify, so they weren't included.

Q. Was there something in the accounting record which indicated whether or not there were additional rejected shipments?

A. Oh, yes. The losses were around $21,000 not just the seven we have for a total.

Q. Do you think it would total $7500?

A. No, it was far greater than that, but I figured that was enough to establish—

Q. You could not definitely identify the other shipments? [fol. 275] A. That is right.

Mr. Ferguson: That is all.

Recross examination.

By Mr. Fourt:

Q. Mr. Piowaty, is this figure of $21,000 an estimate?

A. No, that figure is not an estimate.

Q. Well, is it true and accurate to dollars and cents?

A. No.

Q. So to that extent—

A. It is an estimate.

Q. Would you state it is approximately accurate?

A. I would say it is approximately accurate.

Q. Would you say the approximate figure was calculated in the same manner as were your shipments you labeled as losses on Plaintiffs' Exhibit 21 for identification?

A. No.

Mr. Fourt: No further questions.

Mr. Ferguson: That's all.

(Thereupon, at 11:30 p.m. the deposition was adjourned until the following day.)

[fol. 277] R. M. Wimbish a witness on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Fourt:

Q. What is your name, sir?

A. My name is R. M. Wimbish.

Q. And your address?

[fol. 278] A. My post office address and business mailing address is Box 1148, Homestead, Florida.

Q. What is your occupation or profession?

A. My occupation and profession at the present time is that I am supervising inspector of fruits and vegetables of both the Federal and State Agricultural Inspection Service in the Homestead district. The territory embraces South Miami south to Florida City, inclusive.

Q. And the name of your immediate superior, sir?

A. My immediate superior, which probably would not be clear to you, sir, would be my regional supervisor, however, I am directly responsible for all activities to Mr. Frank Phelan, who is located at Box 307, Belle Glade, Florida.

Q. What is the position or occupation of Mr. Phelan?

A. He is the regional supervisor for the Federal-State Inspection Service. Would you like to have the district that he is in charge of?

Q. From what source do you receive your salary?

A. Our salary comes directly from the Department of Agriculture in Tallahassee, Florida.

Q. Would that be the Florida Department of Agriculture?

A. Yes, but it is called the Federal-State Inspection Service. We are paid through the Department of Agriculture of the State of Florida, however.

Q. Do you have a license issued by the United States [fol. 279] Department of Agriculture?

A. I do.

Q. What is the nature of that license?

A. Well, I will offer that as an exhibit (produces card).

Q. Sir, would you describe this license as it pertains to you?

Mr. Ferguson: Do you want him to read it?

The Witness: The license is self-explanatory, sir. It is issued out of Washington by the United States Department of Agriculture, and it is renewed each year.

Mr. Ferguson: Just read it into the record.

Mr. Fourt: I am reading from license number E-6672, a license which expires June 30, 1958, issued by the United States Department of Agriculture, Agricultural Marketing Service, dated July 1, 1957, which provides that R. M. Wimbish is licensed under the regulations issued pursuant to the Agricultural Marketing Act of 1946 to perform the services indicated on the back of this card. On the back of the card appears this language:

> "The above licensee is authorized to inspect and certify to the quality and condition of citrus, limes, potatoes, tomatoes and avocados."

It has a further notation: "For supervisory work."

By Mr. Fourt:

Q. During the calendar year of 1957, what were the busiest months with respect to your inspection service of avocados in your district?

[fol. 280] A. The busiest months?

Q. Yes.

A. I would say October, November and December.

Q. With respect to avocados, what are your duties?

A. Well, my duties as supervising inspector is to see that the inspectors working under my supervision carry out their job as inspectors in the particular houses where they are assigned for duty.

It is also my job to interpret any grades or anything involving grades, whether it be under committee regulations or anything else. In the event that the inspector has trouble in a packinghouse in interpreting the grades, it is my job to cooperate with him and see that he carries out his duties as a licensed inspector.

Q. Is there any particular rule or regulation under which your inspectors work or are guided by?

A. I don't quite understand that question.

Q. With respect to avocados, Mr. Wimbish, is there a particular governmental regulation which it is your duty to enforce?

A. It is my duty to enforce grade standards under this Federal Marketing Agreement, and it is the duty of the inspector to see that the applicant complies with these regulations.

Q. I hand you defendants' exhibit "N" for identification, and ask you to examine that document?

[fol. 281] A. This document that I now hold is the Avocado Administrative Committee rules and regulations governing the shipment of avocados and the grading thereof.

Q. I now hand you defendants' exhibit "M" for identification, and ask you to identify that document?

A. I am familiar with this document. This is a recap of the effective rules and regulations issued pursuant to the order regulating the handling of avocados grown in South Florida, issued by the Avocado Administrative Committee.

Q. Do defendants' exhibits "N" and "M" constitute the governmental regulations which you enforce with respect to avocados?

A. I don't quite understand that, sir.

Q. I will rephrase the question.

A. These two documents that you just showed me are the grade regulations and a recap of the effective rules and regulations, and these are what the applicants have to

comply with under the regulations and orders of the Avocado Administrative Committee, and it is the Inspection Service's duty to see that they are complied with.

Q. These two documents, defendants' exhibits "M" and "N" are the regulations which you and your inspectors enforce with respect to avocados?

A. That is right.

Q. During the months of October, November and December, 1957 how many inspectors and assistants to you [fol. 282] did you employ with respect to avocado inspection only?

A. Well, sir, during the avocado season I work myself as an inspector; however, we did have seven men, not including myself, working on avocados in this district.

Q. Does the South Florida Growers Association, Inc. operate an avocado packinghouse in your district?

A. Yes, sir.

Q. Do you know the name of the president or the leading officer or managing officer of that corporation?

A. Yes, I do.

Q. What is his name?

A. Mr. Harold E. Kendall.

Q. Is Mr. Kendall in the room at the present time?

A. Yes, sir.

Q. Where is his packinghouse located?

A. It is located just south of Goulds, Florida, on the west side of Highway No. 1, U.S. No. 1.

Q. Are you acquainted with its approximate scope of operations during the avocado harvesting season?

A. Yes. That is one of the primary things that an inspector should know, that is, to understand the operations in a packinghouse; in other words, that is a necessary requisite.

Q. During what period of time during the year 1957 did the operation of the South Florida Growers Association packinghouse reach its maximum capacity?

[fol. 283] A. That is a question that I couldn't answer. We do not keep a record as to the operation of a packinghouse. We only serve them with an inspector, and of course we certify to all fruit that goes out of there that is shipped intra or interstate. I wouldn't have those records here. The

only way I could actually acquire those records would be through our office in Orlando.

Q. Does the Federal-State Inspection Service maintain inspection service for Florida Lime and Avocado Growers, Inc. at Goulds?

A. Yes, we do.

Q. So far as your inspection service is concerned, sir, when and during what period of time is the maximum inspection service required?

A. It is a continuous inspection. He is there all of the time that they are operating.

Q. Is there an increased demand for inspection service during any particular part of the year?

A. I would say that as the season dwindles down we don't have as many inspections. Are you speaking now of the district as a whole or of this particular packinghouse?

Q. This one.

A. There is no need for increasing the inspectors in that packinghouse at any time. One man can handle the entire situation during the operation.

Q. During the peak of the avocado season, with par-
[fol. 284] ticular reference to 1957, could you estimate how many truckloads of avocados are processed and shipped from the Goulds packinghouse by the South Florida Growers Association, Inc.?

A. I wouldn't have the slightest idea. We have no record of where the trucks go or who they go to. We would have no way of knowing whether they were going intrastate or interstate, because they sell a lot locally, and also sell a lot out of the state. Where it ultimately goes we have no information on that, and it is not our desire to have such information, and it is not necessary in the pursuance of our duties.

Q. I direct your attention to defendants' exhibits "M" and "N" for identification, and ask you, sir, if any other written instructions, other than these two documents, are handed to your inspectors for use in the South Florida Growers Association packinghouse at Goulds, Florida?

A. For the inspection of avocados?

Q. Yes.

A. Yes, we sure do have another document. I think I

have one available here, which is absolutely necessary in the performance of our duties with respect to maturity of Florida avocados.

Q. I show you plaintiffs' exhibit 9 for identification, sir, and ask you if you can identify that document?

A. I am quite familiar with it.

Q. Would you identify it or describe it for the record?

A. This document I hold in my hand is the avocado ship-
[fol. 285] ping dates issued by the Avocado Administrative Committee, which presumably controls the shipment of avocados as to maturity. The particular avocados listed on this instrument have shipping dates, weight and minimum diameters at specified dates. It is the duty of the inspector to see that the avocados under these particular varieties coincide with the shipping dates, weight, and measurement.

Q. And your testimony at this moment is with reference to plaintiffs' exhibit 9 for identification?

A. Yes. This is the maturity schedule put out by the Avocado Administrative Committee.

Q. And your testimony of a moment ago referred to this document which is marked plaintiffs' exhibit 9 for identification?

Mr. Ferguson: He just said so; he said it twice. There is no question about that.

Mr. Fourt: Will you stipulate that his testimony of just a moment ago with reference to shipping date schedule, was with reference to plaintiffs' exhibit 9 which he held in his hand at that time?

Mr. Ferguson: Certainly.

By Mr. Fourt:

Q. I now hand you defendants' exhibits "M" and "N" and plaintiffs' exhibit 9, all for identification, and ask you if these three documents constitute the only written instructions which were given to your inspectors to inspect fruit at the South Florida Growers Association packinghouse at
[fol. 286] Goulds, Florida during the avocado season of 1957?

Mr. Ferguson: I think it already appears that this is a summary made of all of the maturity regulations that were issued during the season. It is admitted in the pleadings that there was a series of prior orders and regulations, each fixing dates for shipment of certain fruits. Plaintiffs' exhibit 9 for identification is a summary of all regulations issued in the course of the season. The question here is misleading, because it does not include the fact that the inspectors have partial lists all through the season.

Mr. Fourt: Will the reporter read to the witness my last question?

(Preceding question read by the reporter as above recorded.)

The Witness: That question, sir, I couldn't answer in that form, because these regulations from time to time are subject to change at the direction of the Avocado Administrative Committee. Whenever they do change them, Mr. Biggar, the manager of the Avocado Administrative Committee, immediately furnishes the inspection service with copies of the effective rules and changes. There are times when they change them, and when they change them I am the first man to get the changed regulations, because I have to see that the inspectors get the revised regulations issuued by the Avocado Administrative Committee.

By Mr. Fourt:

Q. Are any written instructions given to your graders [fol. 287] station in the South Florida Growers Association packinghouse at Goulds, Florida other than defendants' exhibits "M" and "N" and plaintiffs' exhibit 9, or documents of that same nature, with respect to their duties?

A. Well, in this period of time I will say that there weren't any others necessary; they had all that was necessary for the carrying out of their duties, that is, these three documents. I gave them written instructions from time to time from my office, but most of the time I just held meetings in my office, and we discussed the different phases of the work. I wouldn't give them written instructions, that is, give written instructions to each inspector.

but I will put it on the bulletin board, and I called it to their attention that these are the regulations that we are to go by, which regulations were issued by the Avocado Administrative Committee.

Q. In addition to written instructions, I take it that you also gave them oral instructions?

A. Definitely, yes.

Q. Are you acquainted with the physical layout of the South Florida Growers Association's packinghouse at Goulds, Florida?

A. I would say that I am familiar with the operations, if that would be considered the physical layout.

Q. Could you briefly describe the operation as the fruit enters the plant until the fruit is packed out of the plant into the truck?

[fol. 288] A. It is first dumped on conveyors, which conveyors take it to the graders, and when the graders grade it, it goes onto the automatic sizers, and from the automatic sizers it falls into individual tubs for a specified or particular size, and then the packers pack out of these tubs, taking a specific size out of each tub.

Q. Into what thing or things do the packers pack the avocados?

A. There are various types of containers. Usually it is what is called a wooden flat.

Q. What happens next, if anything?

A. Now are you speaking of the packinghouse operation or are you speaking of the inspection work?

Q. Well, with respect to the packinghouse at Goulds, Florida, what happens, if anything, after the packer places the fruit in containers?

A. When the packers finish packing a container they place it on what we call a conveyor, and that conveyor conveys the fruit around to another designated spot where it is stacked according to size. This still pertains to the operation of the packinghouse.

Q. What happens next with respect to this fruit in the Goulds packinghouse, if anything, after the fruit is stacked?

A. There is a procedure there for them to place it in a cooler or refrigerating room.

[fol. 289] Q. At this same packinghouse what happens next, if anything?

A. It just stays in the cool room until they get ready to ship it out.

Q. What is the procedure, if there is any, with regard to shipping it out?

A. It is certainly necessary for the packinghouse to have the fruit inspected, and that is where it comes to my job.

Q. I am interested, Mr. Wimbish, in how the fruit leaves the packinghouse or leaves the cooler.

A. They truck it from there into trucks, which are standing alongside the docks.

Q. Sir, at the Goulds packinghouse is the grading done automatically, or how is it done?

A. The grading is done by human hands, by the human element. The sizing is done by weight.

By Mr. Ferguson:

Q. Do you mean weighing or by weight?

A. By weighing. They are placed in these little pockets and then move down to a certain weight where they fall into what we call these tubs.

By Mr. Fourt:

Q. What is the earliest point in the operation that you have just described where the inspector usually makes his inspection at the Goulds packinghouse?

A. The inspector can take his sample any place he so desires. The official inspection is made when the container [fol. 290] is packed and it is on the conveyor starting up to where it is stacked on the floor and segregated by size. However, it is a part of the inspection service to sometimes inspect them in the tub as a preliminary part of the official inspection, and if there is any doubt in the inspector's mind he can tell them that this tub here is not going to grade. They will work on one particular tub or on one particular size before it gets to where the inspection run is officially supervised. His official samples are taken out of the packed box before it is lidded.

Q. Is there any inspection made by your inspector at the completion of the grading belt?

A. Not unless the packinghouse foreman requests it. In

other words, they do occasionally come over and say, "Look at this stuff and see how it is running; do you think this will grade by size or weight?" The inspector will then run sufficient samples to determine whether or not they will meet the specified weight or grade. If they fail to meet the weight and grade, he will have one man go through the fruit one by one. He will check the size of each fruit as it goes to the boxes, and that eliminates any confusion later on after the inspector has made his official inspection.

Q. At the Goulds packinghouse is there a regular practice for the inspector to grade either at the tubs or at the end of the grading belt?

A. No, that is not the regular practice.

[fol. 291] Q. Is it done occasionally at that packinghouse?

A. It is left to the discretion of the inspector. I don't encourage it as supervisor. Any time that the inspection service can be of assistance along these lines, we will run a sample for them before packing it, which is no more than right insofar as the Federal-State Inspection Service is concerned, however, we don't make a practice of it.

Q. In what form does the inspector record his observations, if he does it at all?

A. You mean how does he record his official samples?

Q. No. I mean the earlier inspections.

A. I don't understand you. We don't have an earlier inspection. The official inspections are taken out of the packed box after the graders have graded them, after it is sized and graded in the boxes. That is his official samples, and he records that on his daily worksheet.

Q. Does the inspector record his tests of avocados on his worksheet when the avocados are at the end of the grading line?

A. He makes them at the end of the grading line, and his samples are recorded in the back of his worksheet, on the back of his worksheet. Each size is a different lot.

Q. What is the form of the official grade certificate?

A. On the final certificate issued after the fruit has been inspected?

Q. Yes.

[fol. 292] A. I do not have one of them in my possession now, but the form of certificate is United States Depart-

ment of Agriculture, and we write the grades on it, the number of containers and so forth, and whether or not it meets the Secretary's Order and the specifications of the Avocado Administrative Committee, or whatever grade it was run at that time.

Q. At what point in the operation of the packinghouse at Goulds is the inspection certificate made up?

A. It is made up at the end of the day, or whenever they decide to roll a truck. They give the inspector a manifest for a certain size, which has already been inspected, and it will probably be out of the cooler and ready to go on the truck. The packinghouse foreman will show the manifest to the inspector, and the inspector in turn goes out to the truck and gets the license number of the truck and inserts that on the certificate, so as to show where the truck is from, and he puts down the number of containers shown on the manifest furnished him by the foreman of the packinghouse. I might add, sir, that during this course of operation all of these containers are lot stamped with a Federal stamp, which is the identification to show that the individual boxes have been inspected by the Federal-State Inspection Service, and this stamp shows the house number and lot number. Each house has a lot number and an inspection number on the stamp, and these stamps are issued to these people through our agency every Monday morning for each packinghouse.

[fol. 293] Q. In the ordinary case is any inspection made of the avocados in the containers after the containers are loaded on the truck?

A. There would not be any occasion to unless the applicant so requested, because it is the sort of thing that wouldn't occur anyway, because it is the duty of the inspector to see that these boxes have been inspected.

Q. Is the initial point of the official inspection made of samples in the containers prior to the time of them being placed in the cooler or after removal from the cooler?

A. They are made prior to going into the cooler. That is the usual procedure. In other words, it is a finished product when it goes into the cooler, ready for transportation in or out of the state.

Q. During the 1957-58 avocado season to date, was there

any turnover of personnel in your inspection force with respect to your inspection of avocados?

A. Now, that statement is not very clear to me. Just what do you mean by "turnover" in inspectors? I don't understand just exactly what you mean by turnover of inspectors.

Q. I will rephrase the question. You previously stated that during 1957-58 avocado season you had seven inspectors, as well as yourself, working on avocado inspections; is that right?

A. Yes.

Q. Did the same seven men stay on the job throughout the [fol. 294] season?

A. Yes. We try to maintain a nucleus of inspectors that we consider qualified in this field of certifying avocados. I might say this, which would help you a little bit, although it goes back of what you are asking me. It is an established precedent by our department to change inspectors in each packinghouse once a week, if that is what you are referring to. The same man doesn't stay in one packinghouse all of the time. We switch them around to different packinghouses. The department has found this very desirable in our work. We will assign an inspector to a certain packinghouse for a week, and then he goes around and makes his tour of duty throughout the numerous packinghouses, and then he will come back to this packinghouse. In other words, we just keep rotating them around.

Q. Mr. Wimbish, during the peak of the avocado season in 1957, approximately how many packinghouses were in operation in your district?

A. Some of our "applicants" actually we don't consider them as packinghouses. However, they are all subject to inspection. We would call them little growers or something like that. Would you like for me to elaborate on the applicants that we have and what I consider major packinghouses for avocados?

Q. First, how many major packinghouses operate in your district at the peak of the season?

A. I would say about seven, but we have other applicants [fol. 295] who get inspections of avocados.

Q. How many other applicants or packinghouses, other

than these major packinghouses, do you have which require inspections of avocados?

A. We will put it down as ten. There are seventeen or eighteen applicants. Most of these are small operators. One inspector usually takes care of two or three of those.

Q. Do you maintain an inspector full time during the peak season at each of the seven major packinghouses?

A. No, sir. We only have two houses where the inspector stays on for continuous inspection, that is, two houses in the district.

Q. What are those two houses?

A. Harold E. Kendall, or South Florida Growers Association, and Lucerne.

Q. Are both of those houses included in your category of major packinghouses?

A. Yes.

Q. What arrangement was made with respect to inspection of avocados at the other five major packinghouses?

A. The Florida Lime and Avocado Growers Association and Rowe Groves are two packinghouses which are right together, and one inspector takes care of those two houses. He works back and forth between the two during their operations.

Q. What arrangement was made with respect to the other [fol. 296] three major packinghouses?

A. I used the word "major", and I guess I shouldn't have used that word, because actually that is a little bit on the false side. The meaning of "major" in my opinion is the same as "large". I will say that there are three more. Do you want me to give you the names?

Q. Yes.

A. Parman-Lehman Packinghouse, located at Homestead; Brooks' Groves, and you might put Gloria Groves in with these three. One man takes care of these three.

Q. Where is the Brooks' Groves packinghouse located?

A. On North Krome Avenue, just within the city limits of Homestead, on the west side of the highway.

Q. Where is the Gloria Groves packinghouse located?

A. It is located just four miles northeast of the Seaboard Railroad, in what we call the Redlands District.

Q. What would be the approximate distance between the

Parman-Lehman packinghouse and the Brooks' Groves packinghouse?

A. Two miles.

Q. And the distance from the Parman-Lehman packinghouse to the Gloria Groves packinghouse?

A. What was the first question you asked me? Didn't you ask me the distance from Parman-Lehman to Brooks' Groves packinghouse?

Q. Yes.

[fol. 297] A. That is two miles. Now you are asking me the distance from Parman-Lehman packinghouse to Gloria Groves packinghouse?

Q. Yes.

A. That would be about six miles.

Q. And what is the distance from Brooks' Groves packinghouse to the Gloria Groves packinghouse?

A. About four miles.

Q. And what is the arrangement with respect to providing inspection service to the ten small packinghouses in your district?

A. I will have to deliberate on that to some extent. One man sometimes has to take care of three or four or possibly five little sheds. That is where the growers pack their own stuff. That is what I mean when I say small sheds.

Q. With respect to the ten packinghouses which are smaller than the major packinghouses, is your inspection service continuous?

A. No, it is not continuous. It is what we call "spot checking". They notify the inspectors who are working these particular houses and tell them the approximate time that they expect to get through packing, and he tries to arrange his schedule to take care of these outlying packinghouses.

Q. During the peak of the season in 1957 how often were you able to observe the work of each of your inspectors as they inspected these twenty-four packinghouses in your district?

A. That is a question that would be hard to answer for [fol. 298] the year 1957, because I didn't keep a record of the actual visits that I made to these packinghouses. My visits are made periodically, but on numerous occasions.

On occasions I have calls from my inspectors when they feel like they have something that they are not quite sure about. Then I make a trip up to see this particular inspector and try to interpret the grade or tell him what grade a certain avocado is, or whatever the case may be. I will interpret for him the grade of the fruit or the variety of the fruit. I try to get around to see all of them once a week. If my "houses" are not working, I would make more frequent trips.

Q. To summarize your testimony, Mr. Wimbish, can we say that you see each inspector when they call upon you?

A. Yes. They may call me by telephone if they deem it necessary. Most of the times it is a case of necessity because they are not sure of themselves in regard to grade interpretations of various varieties. If it is a situation of that kind, I make it my business to get there as quickly as possible so as not to delay operations in the packing-house, and that is something that we certainly don't want to do if it is at all possible to avoid it.

Q. During the peak operations in October of 1957, how many calls would you have a day where an inspector requested assistance in determining the variety of an avocado?

A. That is a question that it is almost impossible for me to give a sensible answer to. They might run along for a [fol. 299] week without calling me, and then they might run for twenty-four hours, and then I might get two calls in one afternoon. These loads are coming into the packing-house and naturally he is there to check them as they run through, and they might run a pear through that he wasn't quite sure about. The "applicant" might say this or that, but if the inspector is not sure as to the variety or anything else, his instructions are to contact me as quickly as possible so I can go out and make the best judgment I can in my opinion as to the variety or whatever else it is. As I stated before, that might happen once or twice a day, and then we might go a week without any complaints. It is periodical, I would say.

Q. During the peak of the avocado season in 1957 would such calls in which the inspector asked for assistance to

determine the variety of an avocado, number between five and ten a week?

A. I would say no.

Q. Would it be greater or smaller?

A. It would be less.

Q. Less than five?

A. I would say it would be less than ten by far.

Q. Less than ten but more than five per week?

A. I won't say less than ten and I won't say more than five. You never know when these situations arise. I might be available when a situation comes up and I might not be available. As I stated before, they may run a week or two [fol. 300] without any calls, and then we might get two calls in a day with respect to determining a variety, which requires my identifying the variety.

Q. Does such a call from an inspector occur numerous times during the season?

A. No, sir.

Q. Do you also have calls from inspectors in which they ask for assistance in interpreting the grade of avocados which they are seeking to establish?

A. Not very often, because they are well versed on grades and they know grades. It would be unusual when we had calls for grade interpretations; mostly the calls would have to do with the determination of varieties.

Q. Does the Florida Lime and Avocado Growers Association maintain a packinghouse in your district?

A. Yes, sir.

Q. Are you acquainted with the operation of the packinghouse?

A. Yes, I am acquainted with that type of operation and how they process the fruit. That is one of the primary duties of an inspector working in a packinghouse.

Q. Where is that packinghouse located?

A. Princeton, Florida; just west of U.S. Highway No. 1, across the Florida East Coast Railroad tracks.

Q. Is the method of operation of the packinghouse maintained by the Florida Lime and Avocado Growers Associa- [fol. 301] tion similar to the operation of the packinghouse operated by the South Florida Growers Association?

A. They are similar in one sense, in that they have the same type of machinery. They size by weight mechanically, but they do not have the facilities for refrigeration as does the South Florida Growers Association, and also their fruit is stacked on the packinghouse floor. Incidentally, when they stack it on the packinghouse floor it is accessible at all times for the inspector to make periodical inspections.

Q. At what point in the operation of the packinghouse operated by the Florida Lime and Avocado Growers Association at Princeton is the official inspection made?

A. At the end of the conveyor just before they are lidded up. It is very similar to the operation at the South Florida Growers packinghouse.

Q. Are your inspectors given any specific instructions as to the number of containers they should inspect at the Florida Lime and Avocado Growers packinghouse at Princeton?

A. No specific instructions as to the number of samples that they may run.

Q. Or as to the number of containers that they should sample?

A. We consider the containers the samples. Our inspections are made on a container basis. There is no specified requirement, but it is the duty of the inspector to run as many samples as possible, whether it is on avocados or any [fol. 302] other commodity. In other words, they run as many as they possibly can, and that is their standard instruction.

Q. Is the same instruction given to your inspectors who are stationed at the packinghouse operated by the South Florida Growers Association?

A. Yes.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Wimbish, you described the contents of an inspection certificate. I show you an inspection certificate which has been marked here as plaintiffs' exhibit 3 for identification. Is this one of your inspection certificates?

A. Yes, this is the type of certificate used by us on avocado inspections.

Q. Are you familiar with the signatures of your inspectors?

A. Yes. This one is signed by one of my men, Douglas R. Pfeiffer.

Q. That is the colored copy that goes with the truck?

A. Yes.

Q. There is another copy that goes to the shipper?

A. The shipper gets two copies if he desires, but the truck can get one; in other words, the trucker can get two and the shipper one or the shipper can get one and the trucker two. It is up to them as to which one gets the two copies.

Q. Referring back to this plaintiffs' exhibit 3 for iden- [fol. 303] tification, I will ask you to state what do the letters "MSO" mean?

A. Those letters "MSO" mean that the avocados meet the Florida Avocado Administrative Committee's number two grade. The "MSO" actually means that the avocados meet the "Secretary's Order".

Q. That means the Secretary of Agriculture of the United States?

A. That is right. That is put on all of our certificates when they meet the requirements. If they fail to meet the Secretary's Order, we don't put it on there.

Q. If the lot of avocados fail to meet the Secretary's regulations, you would put a different kind of notation on the certificate?

A. Yes.

Q. What do you do in that case?

A. We inform the "applicant" that it doesn't conform with the Secretary's Order, and if he doesn't do anything

about it and says, "I want to ship it anyway and I want a certificate"—then we write under Remarks on the certificate just the reverse of what is on this certificate, that is, that it fails to meet the Secretary's Order, and that is stamped on the certificate.

Q. Is the shipper permitted to make the shipment anyway?

A. Yes, he can make the shipment, because we can't stop him from shipping it. When that happens, I will immediately notify the manager of the committee as to what went [fol. 304] on. That is my duty as supervisor. It is my duty as supervisor to report any violation to the manager of the committee, and then the committee takes the necessary steps. That is as far as we go with it.

Q. You stated, Mr. Wimbish, that when one of your inspectors is in doubt about the variety of a particular fruit, he calls upon you for advice; is that correct?

A. Yes.

Q. I call your attention to an incident that happened on December 5, 1957, which incident arose at the plant of Florida Lime and Avocado Growers, Inc. packinghouse. Do you recall that on that date there arose a question because the grower claimed that the avocados were Booth 5s and your inspector claimed that they were Booth 3s? Do you recall that incident?

A. Along about the fifth of December?

Q. Yes; involving about one hundred bushels of avocados.

A. I can't say whether it was exactly that date or not, but I do recall very definitely that there were a lot of avocados that the "applicant" claimed were Booth 5s, and he was dissatisfied with the decision of the inspector, so the inspector called on me to come up there and make a decision as to the variety. This was at the Florida Lime and Avocado Growers packinghouse.

Q. Your inspector called you up?

A. Yes.

Q. Did you determine that your inspector was right?

A. Yes. In my opinion they were Booth 3s variety and [fol. 305] not Booth 5 variety. That was my decision. However, I think they were still dissatisfied, which they had a perfect right to be, because if they want to go against my

decision they have a right to take it up with the committee and have the committee make a final decision as to that particular fruit in case such a question arises.

Q. What is that committee called?

A. That committee is called the Variety Index Panel. That panel is appointed by the committee to determine and decide the varieties of fruit. When a situation of this kind occurs, I get in touch with Mr. Biggar, the manager of the Avocado Administrative Committee, and I tell him that they are dissatisfied with my decision, and then he in turn tries to get in touch with each one of these members of the panel committee. This panel is really called the Variety Identifying Committee, and they make the final decision. In this particular case the committee agreed with the inspection service as to that particular variety.

Q. What happened to the avocados?

A. They didn't ship them. It was quite a loss, and it was too bad, however, they still didn't comply with the regulations.

Q. That is your understanding of the procedure?

A. That is right.

Mr. Ferguson: That is all.

Mr. Fourt: No further questions.

And further deponent saith not.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL., APPELLANTS,

vs.

CHARLES PAUL, DIRECTOR OF DEPARTMENT *OF AGRICULTURE* OF CALIFORNIA, ET AL.

No. 49

CHARLES PAUL, DIRECTOR OF DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL., APPELLANTS,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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No. 6—Regulatory operations and Maturity regulations under Florida marketing agreement, 1956-57 season	312	359
No. 7—Summary of (Florida) avocados handled, by varieties and by weeks, 1956-1957 season	314	361
No. 8—Composite supply of avocados in United States, by point of origin, 1955-1956 and 1956-57 season	316	363
No. 9—Avocado shipping dates, under Florida marketing agreement, 1957-58 season	317	364
No. 10—Summary of avocado shipments from South Florida production area, September 30, October 28, November 25 and December 30, 1957, and January 13, 1958	318	365
No. 11—Summary of shipments June 1, 1957 through January 11, 1958	323	370

	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Plaintiffs' Exhibits—Continued		
No. 12—Oil content tests of Florida avocados made at University of Florida Subtropical Experiment Station, Homestead, Florida, at request of Florida Lime and Avocado Growers, Inc.	324	371
No. 13—Oil content tests of Florida avocados made at University of Florida Subtropical Experiment Station at request of South Florida Growers Association, Inc.	328	375
No. 14—Avocado shipping dates, under Florida marketing agreement, 1956-57 season	332	379
No. 15—Bulletins of Avocado Administrative Committee to all Growers and Handlers of Avocados Growers in South Florida, dated May 15, June 13, July 11, August 14, September 10 & 11, 1957	333	380
No. 16—Oil tests of Florida avocados made by Dr. Roy W. Harkness for the years 1953-1957, inclusive	342	389
1953	342	389
1954	362	409
1955	371	418
1956	373	421
1957	380	429
No. 17—Avocado shipments of South Florida Growers Association, Inc., barred from sale in California	389	438
No. 18—Avocados handled in calendar years 1954, 1955, 1956 and 1957	392	440
No. 19—Avocados handled by South Florida Growers Association, Inc., in years 1954-1957, inclusive	393	441
No. 20—Avocados handled by Florida Lime and Avocado Growers, Inc., in years 1954-55, 1955-56, 1956-57, and 1957-58	394	442

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Record from the United States District Court for the Northern District of California, Northern Division—Continued		
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No. 21—Avocado shipments of Florida Lime and Avocado Growers, Inc., barred from sale in California	395	443
No. 22—Standardization violation notice issued by Los Angeles County Agricultural Commissioner, November 20, 1957, on avocados shipped to California by Florida Lime and Avocado Growers, Inc.	397	445
No. 23—General Information on avocado research 1953-1954	398	446
Varieties and sampling 1953-1954	399	447
Score Card for Testing Taste or Flavor of Avocados	400	448
Reprint, "The Relation of Maturity to Quality in Florida Avocados" by Paul L. Harding, from Proceedings of the Florida State Horticultural Society, October, 1954	401	449
Evidence presented at hearing with respect to proposed marketing agreement of Florida avocados by Paul L. Harding, March 8, 1954	406	545
No. 24—General Information on avocado research 1954-1955	420	468
Reprint, "Relation of Maturity of Florida Avocados to Physical Characters" by Mortimer J. Soule, Jr. and Paul L. Harding from Proceedings of the Florida State Horticultural Society, November 1955	424	472
No. 25—General Information on avocado research 1955-1956	430	478
Reprint, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados" from Proceedings of the Florida State Horticultural Society, October, 1957	432	480

	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Plaintiffs' Exhibits—Continued		
No. 26—Resume of Progress of Studies on Florida Avocado Maturity by Thurman T. Hatton, Jr.	438	486
Defendants' Exhibits:	440	488
E—Florida Avocados, Annual Reports for 1955-1956; 1956-1957; 1957-1958; 1958-1959; 1959-1960	440	488
F—Complaint entitled "People of the State of California v. Florida Lime and Avocado Growers, Inc. filed in Sacramento County Superior Court, No. 125826	445	493
Exhibit A—Complaint for injunction entitled "Florida Lime and Avocado Growers v. W. C. Jacobsen, No. 7648 with attached exhibits (copy) (omitted in printing)	449	497
Exhibit B—Order granting leave to plaintiffs to amend and supplement complaint (copy) (omitted in printing)	473	497
Exhibit C—Order granting leave to plaintiffs to amend and supplement complaint (copy) (omitted in printing)	475	497
Exhibit D—Answer of William E. Warne (copy) (omitted in printing)	477	497
Exhibit E—Answer of Edmund G. Brown and Stanley Mosk (copy) (omitted in printing)	481	497
P—Shipments of avocados to California by South Florida Growers Association, Inc. in 1954-1955 season	485	499
Q—Shipments of avocados to California by South Florida Growers Association, Inc., in 1956-57 season	486	500
R—Shipments of avocados to California by South Florida Growers Association, Inc., 1955-56 season	487	501

	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Defendants' Exhibits—Continued		
S—Avocados shipped to California by Florida Lime and Avocado Growers, Inc., in 1954-55, 1955-56, 1956-57 and 1957-58	488	502
Judgment of the Supreme Court of the United States	491	504
Notice of and motions by plaintiffs to amend and supplement complaint; to reconsider and grant plaintiffs' motion made February 2, 1959 to amend complaint; to set case for trial	492	505
Points and authorities	496	508
Special appearance of Edmund G. Brown and Stanley Mosk in opposition to plaintiffs' motion to amend and supplement complaint	504	514
Special appearance of William E. Warne in opposition to plaintiffs' motion to amend and supplement complaint	508	516
Exhibit A—Affidavit of S. R. Whipple	512	519
Exhibit B—Affidavit of William E. Warne	514	521
Orders granting leave to plaintiffs to amend and supplement complaint	522	522
Answer of William E. Warne	528	524
Answer of Edmund G. Brown and Stanley Mosk	532	527
Defendants' written interrogatories (George Norris)	537	530
Answers of George Norris to direct interrogatories propounded on behalf of defendants	543	535
Defendants' Exhibits:	549	541
No. 1—Cash receipt D-4897, dated December 4, 1958 given by South Florida Growers Association, Inc. to Mr. Norris	549	541
No. 2—Air express receipt 74-06-61, dated December 4, 1958 given to Mr. Norris covering one flat of avocados	550	543
No. 3—Cash receipt D-4786, dated November 12, 1958 given by South Florida Growers Association, Inc. to Mr. Norris	552	545
No. 4—Air express receipt 73-94-06, dated November 12, 1958 given to Mr. Norris covering one flat of avocados	553	547

	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Answers of Fred Piowaty to defendants' interrogatories (Defendants' Exhibit C)	555	549
Answers of Harold E. Kendall to defendants' interrogatories (Defendants' Exhibit D)	558	551
Motion of plaintiffs for leave to substitute James T. Ralph as defendant in place of William E. Warne	561	553
Stipulation re plaintiff corporations	584	554
Stipulation re exhibits	585	555
Motion of plaintiffs to substitute Charles Paul as defendant in place of William E. Warne	588	556
Reporter's transcript of hearing of February 7, 1961 (Partial)	1	557
Appearances	1	557
Plaintiffs' witness:	2	558
Testimony of Paul Louis Harding—		
direct	2	558
cross	70	603
redirect	81	611
recross	96	621
Colloquy between court and counsel	97	622
Defendants' motion to dismiss	102	625
Defendants' witnesses:	103	626
Testimony of H. W. Poulsen—		
direct	103	626
cross	115	634
redirect	126	641
recross	127	642
Colloquy between court and counsel	128	642
Testimony of David Appleman—		
direct	135	647
cross	145	654
redirect	156	661
recross	157	662

	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Reporter's transcript of hearing of February 7, 1961 (Partial)—Continued		
Defendants' witnesses—Continued		
Testimony of Presley Wiggs—		
direct	159	663
cross	165	667
redirect	175	674
recross	176	674
Albert C. Jones—		
direct	176	675
cross	180	678
redirect	182	678
S. R. Whipple—		
direct	182	679
cross	185	681
Colloquy between court and counsel	186	682
Amended motion and supplemental complaint for substitution of party defendant	193	686
Points and authorities	195	687
Order correcting clerical error	197	688
Stipulation re exhibits (copy) (omitted in printing)	198	689
Stipulation re plaintiff corporations (copy) (omitted in printing)	200	689
Special appearance in opposition to plaintiffs' motion to substitute Paul for Warne	201	689
Defendants' reply brief	206	692
See topical index	208	692
Exhibit A—3 California Administrative Code —1397.5 (copy) (omitted in printing)	284	747
Exhibit B—Reprint from The Bulletin of Department of Agriculture, State of California, entitled "Official method for the determination of oil in avocados" (copy) (omitted in printing)	285	748

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	Original	Print
Record from the United States District Court for the Northern District of California, Northern Division—Continued		
Defendants' reply brief—Continued		
Exhibit C—Picture of Waring Blendor used by University of Florida Sub-Tropical Experiment Station	290	749
Exhibit D—Picture of machine used in the California tests—"ball-grinder"	291	750
Exhibit E—Report of Chemical Analysis, dated December 11, 1958 of the Bureau of Chemistry, State of California	292	751
Exhibit F—Results of Tests made on 32 Florida Avocados by State of California Bureau of Chemistry (Explanation of Methods Shown on Official Report)	297	756
Memorandum and order	299	757
Plaintiffs' objections to proposed findings of fact, conclusions of law, rulings on evidence and judgment order	316	770
Defendants' reply to plaintiffs' objections to proposed findings	320	773
Order overruling plaintiffs' objections to proposed findings of fact, conclusions of law, rulings on evidence, and judgment order	325	777
Findings of fact and conclusions of law	327	778
Order re plaintiffs' motion to substitute and ruling on evidentiary matters	332	782
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Order that certain original records be included in appeal record	339	784
Answer of Charles Paul	340	785
Plaintiffs' notice of appeal	345	788
Notice of cross-appeal	359	793
Orders noting probable jurisdiction	362	795

Registered Avocado Handler

NO. 7

This Is To Certify That Florida Lime & Avocado Growers, Inc.

Mailing Address P. O. Box 176, Princeton, Fla.

Inspection Point Princeton

has complied with the provisions prescribed in the Avocado Marketing Agreement and Order and is hereby authorized to operate as a Handler of Avocados and to pack Avocados for market or transportation during the shipping season beginning 4/1/57 and ending 3/31/58.

1957-58
SEASON

Avocado Administrative Committee

1102 NORTH KROME AVENUE
HOMESTEAD, FLORIDA

ISSUED April 9, 1957

Daniel H. Zapp
Manager

[fol. 306]

PLAINTIFFS' EXHIBIT 1

PLAINTIFFS' EXHIBIT 2

[fol. 307]

354

Avocado Handler

NO. 18

This Is To Certify That South Florida Growers Assn., Inc.

Mailing Address P. O. Box 468, Goulds, Fla.

Inspection Point Goulds

has complied with the provisions prescribed in the Avocado Marketing Agreement and Order and is hereby authorized to operate as a Handler of Avocados and to pack Avocados for market or transportation during the shipping season beginning 4/1/57 and ending 3/31/58.

1957-58
SEASON

Avocado Administrative Committee
1102 NORTH KROME AVENUE
HOMESTEAD, FLORIDA

ISSUED April 9, 1957

Manager

[fol. 308]

PLAINTIFFS' EXHIBIT 3

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
FLORIDA DEPARTMENT OF AGRICULTURE
CITRUS AND VEGETABLE INSPECTION DIVISION

No. B- 66158

TRUCK INSPECTION CERTIFICATE

I, the undersigned, on the date specified made personal inspection of samples believed by me to be representative of the lot of products herein described and do hereby certify that the conditions, at the said time on said date, pertaining to such products as shown by said samples, were as stated below:

INSPECTION POINT: PRINCETON, Fla. TRAILER TRUCK INITIAL & NO. FLA 1-0-853

INSPECTION BEGUN: 9:00 AM (HOUR) NOVEMBER 14, 1957 (DATE) COMPLETED: 2:30 PM (HOUR) NOVEMBER 15, 1957 (DATE)

APPLICANT: FLORIDA LIME & AVOCADO GROWERS INC ADDRESS: PRINCETON, FLORIDA

PRODUCT	NO. PACKAGES	KIND OF CONTAINER	~~BRAND~~	~~GRADE~~
			STAMPED	FRUITS
AVOCADOS	1874	1/4 BU F.B. BOX	LOT 59 HSC 20	1874

INSPECTED AND RELEASED
1957 GLENN HAVEN
Station
U.S. Agriculture

NAME...
AFTER
THIS

SIZE

REMARKS MEETS FLORIDA ANC NO 2 GRADE MSO

Douglas C. Pfeiffer

Miles @ 7-½¢ per mile = $

(INSPECTOR)

SUMMARY OF AVOCADO SHIPMENTS
BY VARIETIES AND BY WEEKS
1955-56 SEASON
(55# Box Equivalents)

Line	Week Ending	Fuchs	Pollocks & Simmonds	Trapp	Waldin	Pinelli	Tonnage	Booth 8	Simpson	Lula	Booth 7 Booth 7B	Hickson	Collinson
1	Jun 16-Jul 2	75											
2	Jul 9	1991	336										
3	Jul 16	2154	1099										
4	Jul 23	3248	3194										
5	Jul 30	2152	4495										
6	Aug 6	1203	4783										
7	Aug 13	272	5776	159	170								
8	Aug 20	206	2313	684	3296								
9	Aug 27	246	1286	4301	4480	131							
10	Sep 3	25	271	1646	10260	332							
11	Sep 10	5	250	2055	7115	154	266						
12	Sep 17	4	99	2284	13073	205	366	496					
13	Sep 24		95	1160	0366	25	784	3362					
14	Oct 1		8	362	2614	49	2133	2334	314				
15	Oct 8			274	1108		963	11072	257	1402			
16	Oct 15			36	655	1		4653		1002	3619		
17	Oct 22		36	32	645	9	2	23335	364	5724	1518	816	1843
18	Oct 29		18	25	268			10231	100	3528	7289	769	1047
19	Nov 5			2	162			6394	26	3906	4442	5180	1230
20	Nov 12				21			8515		3600	8515	1867	1043
21	Nov 19				26			9075	18	10659	9118	1973	2161
22	Nov 26							1945	14	9225	5343	783	505
23	Dec 3							2329		5557	8051	2022	451
24	Dec 10							1021		4532	8510	2721	1333
25	Dec 17							390		7667	3925	1702	829
26	Dec 24							12		4237	1271	239	81
27	Dec 31							45		3744	4099	187	110
28	Jan 7							228		5723	1660	58	59
29	Jan 14							41		11371	695	39	200
30	Jan 21							16		11476	229	9	409
31	Jan 28									3763			156
32	Feb 4									7060	29		142
33	Feb 11									4959			36
34	Feb 18									2308			
35	Feb 25									1121			
36	Mar 3									1115			
37	Mar 10									407			
38	Mar 17									4			
39	Mar 24												
40	Mar 31									27			
	TOTAL	11581	24059	13028	50259	906	4514	85494	1093	124237	68613	18425	11635

Monroe	Hall	Avon	Harman	Booth 3	Booth 5	Choquette	Taylor	Booth 1	Linda	Wagner	Seedling	Other	TOTAL	Line
											21	--	96	1
											27	10	2304	2
											149	14	3416	3
											105	35	6612	4
											245	61	6953	5
											590	32	6608	6
											919	23	7319	7
											1491	52	8042	8
											1590	46	12080	9
											1362	41	13937	10
											1246	80	11171	11
											1293	61	17881	12
											1050	285	13133	13
											1080	103	8997	14
											1401	420	16897	15
											784	383	11133	16
											477	23	34624	17
364	221	70									445	309	24684	18
153	190	29	30								276	392	22472	19
	185	84	16	558							138	141	29633	20
	204	17	180	1548	655		5				151	499	36289	21
	170	209	35	959		105		164			13	145	20115	22
	85	503	256	4214	62	53	145	614			192	567	25101	23
	177	629	66	2405		24	166	2250			99	363	24298	24
1	147	18	93	3854	560	516	877	2544	196		29	281	25691	25
	37		80	806	369	39	470	4413	28		22		12104	26
11	47	10	23	883	123	483	2089	4012	193		44	181	16284	27
76	40		165	1036	4	189	1132	6618	202	10	176	328	17672	28
253	38			665	9	496	1582	5825	36	86	319	38	21675	29
1084	4		13	132	9	397	1748	1548	53	329	416	28	17900	30
196	6		13	33		51	1750	244	85	483	20	133	11933	31
633						4	956	121	230	669		125	10019	32
656					15	5	1978	154	461	712	152	302	9430	33
98					2	27	1753	191	555	661	5	288	5928	34
171							659	192	2	402	53	392	2992	35
105						9	18	2	23	67		357	1696	36
							22	1		13	4	193	640	37
							5	2	1	24	7	67	110	38
										13		11	24	39
							29	28		16			100	40
3801	1551	1569	972	17093	1808	2368	15344	28921	2117	3487	16391	6837	516103	TOTAL

[fol. 310]

COMPOSITE SUPPLY OF AVOCADOS
1955-56 Season
By Points of Origin
(55# Bushels)

		California*	Florida	Cuba**	U. S. Total
April	9	56,250			56,250
	16	55,500			55,500
	23	54,500			54,500
	30	53,250			53,250
May	7	52,500			52,500
	14	51,000			51,000
	21	49,000			49,000
	28	47,500			47,500
June	4	45,500			45,500
	11	41,000			41,000
	18	34,000			34,000
	25	26,000		12,000*	38,000
July	2	21,500	90	13,944*	35,540
	9	19,500	2,364	16,677*	38,541
	16	18,000	3,416	25,709	47,125
	23	17,500	6,612	12,727	36,839
	30	17,000	6,953	21,716	45,669
Aug.	6	17,000	6,608	17,716	41,324
	13	16,500	7,319	12,882	36,701
	20	16,500	8,042	13,621	38,163
	27	16,000	12,080	11,163	39,243
Sept.	3	16,000	13,937	7,171	37,108
	10	16,000	11,171	3,171	30,342
	17	15,500	17,881	1,939	35,320
	24	15,500	13,133		28,633
Oct.	1	15,500	8,997		24,497
	8	15,500	16,897		32,397
	15	15,500	11,133		26,633
	22	15,000	34,624		49,624
	29	14,500	24,684		39,184
Nov.	5	14,000	22,472		36,472
	12	12,000	29,683		41,683
	19	10,000	36,289		46,289
	26	5,000	20,115		25,115
Dec.	3	8,000	25,101		33,101
	10	10,000	24,298		34,298
	17	10,500	23,691		34,191
	24	5,000	12,104		17,104
	31	9,000	16,284		25,284
Jan.	7	12,000	17,672		29,672
	14	14,000	21,675		35,675
	21	16,500	17,900		34,400
	28	18,000	11,933		29,933
Feb.	4	19,000	10,019		29,019
	11	20,000	9,430		29,430
	18	20,000	5,928		25,928
	25	20,000	2,992		22,992
Mar.	3	20,000	1,696		21,696
	10	20,000	640		20,640
	17	20,000	110		20,110
	24	20,000	24		20,024
	31	20,000	100		20,100
Total		1,187,500	516,103	170,436	1,874,039

* Estimated from monthly production data.

** Unpublished records of U. S. D. A. Inspection Service.

* Estimated from monthly production data [illegible] Inspection Service

REGULATORY OPERATIONS

The Marketing Agreement and Order regulating the handling of avocados grown in South Florida permits the issuance of the following types of regulations:

1. Maturity Regulations
   S/S 969.51 (1) "Prohibit, prior to such time as shall be specified, the handling of any size or sizes of any variety or varieties of avocados grown in District 1 or District 2."

2. Grade and Size Regulations
   S/S 969.51 (2) "Prohibit the handling of any variety or varieties of avocados grown in District 1 or District 2 which do not meet such quality and maturity standards as shall be prescribed."

3. Container Regulations
   S/S 969.51 (3) "Fix the size, capacity, weight, dimensions, or pack of the container or containers which may be used in the packaging, and the transportation, sale, shipment or other handling of avocados."

All of these forms of regulation were recommended and used during the 1956-57 season, plus a modified and expanded schedule of procedural rules as authorized by S/S 969.28(c) of the Order.

MATURITY REGULATIONS

Shipping weights, dates and sizes were established for a total of 45 named varieties and for two general classifications of seedlings and unlisted varieties. The seedling regulations were as follows:

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations:

West Indian Type:	None before June 1. June 1 to June 18, none smaller than 16 oz. June 18 to July 16, none smaller than 14 oz. July 16 to Sept. 10, none smaller than 12 oz. After Sept. 10, no restrictions.
Guatemalan Type and Guatemalan x W. Indian Hybrids:	None before Sept. 3. Sept. 3 to Oct. 1, none smaller than 14 oz. Oct. 1 to Dec. 17, none smaller than 12 oz. After Dec. 17, no restrictions.

Exceptions applicable to seedlings and unlisted varieties: Avocados which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

[fol. 312]
PLAINTIFFS' EXHIBIT 6
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The following shipping schedule was applied to named varieties during the 1956-57 season:

Variety	Date A	Min Wt	Min Dia	Date B	Min Wt	Min Dia	Date C	Min Wt	Min Dia	Date D
Fuchs	6-18	12	3 1/16	7-2	10	2 13/16	7-16	8	2 9/16	8-6
Pollock	7-2	18	3 10/16	7-16	15	3 6/16	7-30	12	3 1/16	8-27
Simmonds	7-2	16	3 9/16	7-16	14	3 7/16	7-30	12	3 4/16	8-27
Nadir	7-2	14	3 5/16	7-16	12	3 2/16	7-30	9	2 12/16	8-27
Hardee	7-2	16	3 5/16	7-16	14	3 2/16	7-30	10	2 12/16	8-27
Trapp	7-23	14	3 9/16	8-6	12	3 7/16	8-20	10	3 3/16	9-17
Waldin	7-30	16	3 9/16	8-13	14	3 6/16	8-27	10	3 1/16	10-15
Peterson	8-6	12	3 6/16	8-20	10	3 2/16	9-3	8	2 14/16	9-24
Pinelli	8-20	18	--	8-27	16	--	9-3	12	--	9-24
Tonnage	8-20	14	--	8-27	12	--	9-3	10	--	9-24
Fairchild	8-20	16	3 10/16	9-3	14	3 7/16	9-17	10	3 0/16	10-1
(Booth 8	9-17	15	3 6/16	9-24	13	3 4/16	10-15	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	11-5	9	2 14/16	11-26
Nirody	9-17	18	3 15/16	10-1	15	3 11/16	10-15	10	3 3/16	11-5
Simpson	10-1	16	--	10-15	14	--	10-29	10	--	11-19
(Lula	10-8	18	3 10/16	10-22	16	3 7/16	11-5	14	3 4/16	--
(Lula	--	--	--	--	--	--	12-3	11	2 15/16	12-10
Rue	10-8	30	4 3/16	10-15	24	3 15/16	10-29	18	3 9/16	11-12
Black Prince	10-8	16	--	10-22	14	--	11-5	10	--	11-26
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-3
Sherman	10-15	16	--	10-29	14	--	11-12	10	--	12-3
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-3
Marcus	10-15	32	--	--	--	--	--	--	--	11-26
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-10
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-10
Avon	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Booth 5	10-22	16	3 11/16	11-5	14	3 9/16	11-19	9	3 1/16	12-10
Blair	10-22	16	--	11-5	14	--	11-19	9	--	12-10
Nelson	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Monroe	10-29	24	--	11-26	20	--	12-17	14	--	1-7
Hall	11-5	20	3 9/16	11-19	16	3 5/16	12-3	14	3 3/16	12-24
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-24
Winslowson	11-5	18	3 14/16	11-19	16	3 12/16	12-3	10	3 2/16	12-24
Booth 10	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Booth 11	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Ajax (Booth 7B)	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-31
Booth 3	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-7
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7
Dunedin	11-19	16	3 10/16	12-3	14	3 8/16	12-17	9	2 15/16	1-7
Choquette	11-26	24	--	12-10	18	--	12-17	14	--	12-31
Linda	12-10	18	--	12-24	15	--	1-7	12	--	1-21
Byars-1	12-10	16	--	12-24	14	--	1-7	9	--	1-28
Nabal	12-10	14	3 8/16	12-24	12	3 5/16	1-7	8	2 14/16	1-28
Wagner	12-17	12	3 5/16	12-31	10	3 2/16	1-14	8	2 14/16	2-4
Schmidt	1-28	16	--	2-11	14	--	--	--	--	2-25
Itzamna	2-25	--	--	--	--	--	--	--	--	2-25

Date "A" No fruit may be shipped before this date.
Date "D" No restrictions on size or weight after this date.
Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
All weights in ounces, diameters in inches.

SUMMARY OF AVOCADOS HANDLED
By Varieties and by Weeks
1956-57 Season
55# Box Equivalent*

LINE	Week Ending	Fuchs	Pollocks & Simmonds	Trapp	Waldin	Pinelli	Tonnage	Booth 8	Simpson	Lula	Booth 7 Booth 7B	Hickson	Collinson
1	Jun 1 Jun 30	5											
2	Jul 7	195											
3	Jul 14	650	25										
4	Jul 21	677	1310										
5	Jul 28	723	3370										
6	Aug 4	377	4270										
7	Aug 11	696	2866										
8	Aug 18	289	1468	89	485								
9	Aug 25	105	645	1605	1323								
10	Sep 1	56	496	968	4905								
11	Sep 8	13	270	1308	2981	47	447						
12	Sep 15	12	173	1741	6645	16							
13	Sep 22		21	1972	6060		10	758					
14	Sep 29		16	812	5143	135	461	4838					
15	Oct 6		28	1099	4741		1103	5251	18				
16	Oct 13		1	695	4240	2	2340	4510		430			
17	Oct 20			203	698		32	10872	62	733	2506		
18	Oct 27			25	734		110	4117	187	6136	1749	1739	3323
19	Nov 3			28	172		2	3877	189	4746	6093	757	2235
20	Nov 10			2	8		2	5945	10	5097	2047	2495	3193
21	Nov 17				8		2	2363		7669	10315	1329	799
22	Nov 24				5			1507		6482	1831	1308	1523
23	Dec 1							5296		8817	4326	2237	1124
24	Dec 8							2464		14337	4525	1907	1007
25	Dec 15							1598	22	11868	2611	1983	401
26	Dec 22							1090	22	4369	668	987	317
27	Dec 29							409		4918	700	394	632
28	Jan 5							269	4	11026	1440	611	1556
29	Jan 12							70		10981	643	466	1154
30	Jan 19							97		9286	113	251	454
31	Jan 26									6289	25	4	153
32	Feb 2							9		7026	10		243
33	Feb 9							2		8129	8	9	135
34	Feb 16							2		8126	13		78
35	Feb 23									6137	10	8	5
36	Mar 2									1077			
37	Mar 9									1104			
38	Mar 16									490			
39	Mar 23									53			
40	Mar 31									3			
	TOTAL	3798	14959	10547	38148	200	4509	55344	514	145329	39633	16485	18332

[fol. 314]
PLAINTIFFS' EXHIBIT 7
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Avon	Monroe	Hall	Booth 5	Herman	Booth 3	Booth 1	Choquette	Taylor	Linda	Wagner	Seedling	Other	TOTAL	LINE
													5	1
													195	2
											4		679	3
											27	91	2105	4
											57	22	4172	5
											185	3	4835	6
											471	2	4035	7
											647	4	2982	8
											676	62	4416	9
											563		6988	10
											573	24	5663	11
											499	11	9097	12
											703		9524	13
											944	36	12385	14
											888	141	13269	15
											1605	389	14212	16
											848	576	16530	17
39											1270	138	19567	18
	8										428	254	18789	19
36	15	971	15								353	395	20584	20
	657	569	9	75							303	253	24351	21
365	164	328	23	19	473	778					246	105	15157	22
4	231	242	267	174	1576	1489	284	76			186	716	27045	23
	103	244	84	329	1414	3838	137	34			217	582	31222	24
		243	43	100	900	1029	457	692	82		211	130	22370	25
		67	9		1531	415	117	309			21	35	9957	26
		14	2	5	1294	1477	100	574	31		100	91	10741	27
		235	114	34	2456	2255	209	2740	55		229	12	23245	28
	96	104	90	107	1269	2554	233	3257	321		166	212	21723	29
		46	3		319	1087	19	3590	113	138	131	145	15792	30
	48	6	8	1	165	1341	121	2969	190	34	37	212	11603	31
	532	79	21	9	272	843	60	3765	200	26	96	68	13259	32
	510	17		3	38	773	75	3437	215	1249	78	152	14830	33
	448	19		7	22	204	11	1131	510	557	104	431	11663	34
11	253				20	133	29	1524	546	206	66	177	9125	35
	112				43	42		1021	343	126	105	862	3731	36
	152	9			15	37		157	13	46	52	977	2562	37
	15				7			1	59	57	11	156	796	38
									21		20	61	155	39
						3					4	50	60	40
455	3344	3193	688	863	11814	18298	1852	25277	2699	2439	13124	7575	439419	TOTAL

* Lines 1-13 show net quantities shipped, based on 3 flats equal 1 multilayer, 4 flats equal one bushel.

Lines 14-40 show approximate gross quantities handled (including gradeout) as reported weekly by handlers.

COMPOSITE SUPPLY OF AVOCADOS
By Season and Point of Origin
(Bushels)

1955-56 Season					1956-57 Season				
Week Ending	California	Florida*	Cuba	U. S. Total*	Week Ending	California	Florida	Cuba	U. S. Total
Apr 9	56,250			56,250	Apr 7	22,000			22,000
16	55,500			55,500	14	21,900			21,900
23	54,500			54,500	21	21,200			21,200
30	53,250			53,250	28	20,600			20,600
May 7	52,500			52,500	May 5	19,500			19,500
14	51,000			51,000	12	18,000			18,000
21	49,000			49,000	19	14,000			14,000
28	47,500			47,500	26	9,600			9,600
Jun 4	45,500			45,500	Jun 2	7,400			7,400
11	41,000			41,000	9	7,000			7,000
18	34,000			34,000	16	7,000			7,000
25	26,000		12,000	38,000	23	7,000		2,640	9,640
Jul 2	21,500	162	13,944	35,606	30	7,100	5	6,036	13,141
9	19,500	2,351	16,677	38,528	Jul 7	7,200	195	8,773	16,168
16	18,000	3,470	25,709	47,179	14	7,400	679	12,399	20,478
23	17,500	7,000	12,727	37,227	21	7,500	2,105	15,967	25,572
30	17,000	6,513	21,716	45,229	28	7,600	4,172	17,153	28,925
Aug 6	17,000	6,946	17,716	41,662	Aug 4	8,000	4,835	17,387	30,222
13	16,500	7,213	12,882	36,595	11	8,200	4,035	15,997	28,232
20	16,500	7,991	13,621	38,112	18	8,500	2,982	14,642	26,124
27	16,000	12,410	11,163	39,573	25	8,800	4,416	15,270	28,486
Sep 3	16,000	14,459	7,171	37,630	Sep 1	8,800	6,988	14,103	29,891
10	16,000	11,557	3,171	30,728	8	9,200	5,663	10,691	25,554
17	15,500	17,446	1,939	34,885	15	9,700	9,097	5,065	23,862
24	15,500	12,876		28,376	22	10,100	9,524	2,696	22,320
Oct 1	15,500	12,048		27,548	29	10,800	9,697		20,497
8	15,500	14,027		29,527	Oct 6	11,000	9,974		20,974
15	15,500	10,544		26,044	13	11,000	10,851		21,851
22	15,000	34,740		49,740	20	10,200	14,131		24,331
29	14,500	24,202		38,702	27	9,000	15,368		24,368
Nov 5	14,000	21,715		35,715	Nov 3	7,500	12,524		20,024
12	12,000	28,894		40,894	10	3,000	17,208		20,208
19	10,000	36,682		46,682	17	5,000	19,793		24,793
26	5,000	18,499		23,499	24	5,500	12,013		17,513
Dec 3	8,000	22,483		30,483	Dec 1	6,000	21,515		27,515
10	10,000	24,564		34,564	8	5,500	24,481		29,981
17	10,500	25,290		35,790	15	3,000	20,614		23,614
24	5,000	9,655		14,655	22	5,500	9,278		14,778
31	9,000	15,180		24,180	29	7,700	8,011		15,711
Jan 7	12,000	18,153		30,153	Jan 5	9,200	17,411		26,611
14	14,000	21,075		35,075	12	10,400	16,974		27,374
21	16,500	17,096		33,596	19	11,700	12,804		24,504
28	18,000	11,591		29,591	26	12,700	8,646		21,346
Feb 4	19,000	9,526		28,526	Feb 2	14,000	11,097		25,097
11	20,000	9,017		29,017	9	15,000	12,142		27,142
18	20,000	5,601		25,601	16	16,000	8,760		24,760
25	20,000	2,751		22,751	23	17,000	6,180		23,180
Mar 3	20,000	1,658		21,658	Mar 2	17,500	3,584		21,084
10	20,000	678		20,678	9	17,500	2,216		19,716
17	20,000	101		20,101	16	17,500	798		18,298
24	20,000	22		20,022	23	17,000	108		17,108
31	20,000	96		20,096	31	16,000	53		16,053
	1,187,500	506,282	170,436	1,864,218		575,500	360,927	158,819	1,095,246

Source: California shipments estimated from monthly production data supplied by Calavo Growers of California. Florida shipments from Avocado Administrative Committee files (does not reflect corrections or amendments to certificates). Cuban shipments from unpublished U. S. D. A. records.

* 1955-56 Florida quantities revised to reflect standard base of 4 flats = one bushel, one multilayer equals 3 flats.

[Col. 316]

Plaintiffs' Exhibit 8

AVOCADO SHIPPING DATES
1957-58 Season
(Issued October 8, 1957)

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7
(Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	10-14	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	10-28	10	2 15/16	11-18
Nirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 3/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
B. Prince	10-7	16		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	--
(Lula	--	--	--	--	--	--	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								11-25
Hickson	10-21	14	3 4/16	11-4	12	3 1/16	11-18	10	2 15/16	12-9
Collinson	10-21	16	3 11/16	11-4	14	3 8/16	11-18	10	3 1/16	12-9
Avon	10-21	14	3 8/16	11-4	12	3 5/16	11-18	9	2 15/16	12-9
Booth 5	10-21	16	3 11/16	11-4	14	3 9/16	11-18	10	3 3/16	12-9
Blair	10-21	16		11-4			11-18			12-9
Nelson	10-21	14	3 8/16	11-4	12	3 5/16	11-18	10	3 1/16	12-9
Winslowson	10-28	18	3 14/16	11-11	16	3 12/16	11-25	10	3 2/16	12-24
Monroe	10-28	24		11-25	20		12-16	14		1-6
Hall	10-21	24	3 13/16	11-4	18	3 7/16	12-2	14	3 3/16	12-24
Herman	11-4	16	3 9/16	11-18	14	3 7/16	12-2	10	3 1/16	12-24
Booth 10	11-4	16		11-18	14		12-2	10		12-24
Booth 11	10-28	16	3 12/16	11-11	14	3 9/16	12-2	10	3 3/16	12-24
Ajax(B. 7B)	11-11	18	3 12/16	11-25	15	3 9/16	12-9	11	3 3/16	12-31
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31
Booth 1	11-18	16	3 11/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Taylor	11-18	14	3 4/16	12-2	12	3 2/16	12-16	9	2 13/16	1-6
Dunedin	11-18	16	3 10/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Choquette	10-28	30	4 5/16	11-18	22	3 15/16	12-2	18	3 11/16	1-6
Linda	12-9	18		12-23	15		1-6	12		1-20
Byars #1	12-9	16		12-23	14		1-6	10		1-27
Nabal	12-9	14	3 8/16	12-23	12	3 5/16	1-6	9	3 0/16	1-27
Wagner	12-16	12	3 5/16	12-30	10	3 2/16	1-13	8	2 14/16	2-3
Schmidt	1-27	16		2-10	14					2-24
Itzamna	2-24									2-24

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight on or after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations

West Indian Type:
None to be shipped before June 3
June 3 to June 17, none smaller than 16 oz.
June 17 to July 15, none smaller than 14 oz.
July 15 to Sept. 9, none smaller than 12 oz.
On or after Sept. 9, no size restrictions

Guatemalan Type and Guatemalan x W. Indian Hybrids:
None to be shipped before Sept. 9
Sept. 9 to Oct. 7, none smaller than 14 oz.
Oct. 7 to Dec. 23, none smaller than 12 oz.
On or after Dec. 23, no size restrictions

Exceptions applicable to seedlings and unlisted varieties: Avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

AAC-417

PLAINTIFF'S EXHIBIT 9

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-14 — September 30, 1957

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season	
Period	Bushels	Period	Bushels
April 1-July 27	8,430	April 1-July 28	7,156
July 28-Aug. 3	2,974	July 29-Aug. 4	4,835
Aug. 4-10	6,575	Aug. 5-11	4,035
Aug. 11-17	5,493	Aug. 12-18	2,982
Aug. 18-24	8,086	Aug. 19-25	4,416
Aug. 25-31	11,509	Aug. 26-Sept. 1	6,988
Sept. 1-7	14,805	Sept. 2-8	5,663
Sept. 8-14	11,838	Sept. 9-15	9,097
Sept. 15-21	12,358	Sept. 16-22	9,524
Sept. 22-28	11,054	Sept. 23-29	9,697
Total	93,122		64,393

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Sept. 15-21, 1957	45,905	1,176
Sept. 22-28, 1957	40,911	1,102
Sept. 23-29, 1956	36,148	881

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-July 27, 1957	33,715	11,201	33.2
July 28-Aug. 3	11,897	4,038	33.9
Aug. 4-10	26,301	4,048	15.4
Aug. 11-17	21,972	4,844	22.0
Aug. 18-24	32,343	3,469	10.7
Aug. 25-31	46,036	4,724	10.3
Sept. 1-7	59,215	4,471	7.5
Sept. 8-14	47,353	3,181	6.7
Sept. 15-21	49,433	5,233	10.5
Sept. 22-28	44,217	3,120	7.0
Total	372,486	48,329	12.9

*Does not include drop lots transported by common or contract carriers.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-412

Vol. 318
PLAINTIFFS' EXHIBIT 10
365

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue Telephone CI 7-0848

Report No. 57/58-18 October 28, 1957

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season	
Period	Bushels	Period	Bushels
April 1-Aug. 31	43,067	April 1-Sept. 1	30,412
Sept. 1-7	14,805	Sept. 2-8	5,663
Sept. 8-14	11,838	Sept. 9-15	9,097
Sept. 15-21	12,358	Sept. 16-22	9,524
Sept. 22-28	11,054	Sept. 23-29	9,697
Sept. 29-Oct. 5	18,083	Sept. 30-Oct. 6	9,974
Oct. 6-12	17,974	Oct. 7-13	10,851
Oct. 13-19	26,417	Oct. 14-20	14,131
Oct. 20-26	20,986	Oct. 21-27	15,368
Total	176,582		114,717

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Oct. 13-19, 1957	99,562	2,035
Oct. 20-26, 1957	75,842	2,701
Oct. 21-27, 1956	55,964	1,836

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Aug. 31, 1957	172,264	32,324	18.7
Sept. 1-7	59,219	4,471	7.5
Sept. 8-14	47,353	3,181	6.7
Sept. 15-21	49,433	5,233	10.5
Sept. 22-28	44,217	3,120	7.0
Sept. 29-Oct. 5	72,334	3,847	5.3
Oct. 6-12	71,897	5,230	7.2
Oct. 13-19	105,667	3,924	3.7
Oct. 20-26	83,945	5,259	6.3
Total	706,329	66,589	9.4

*Does not include drop lots transported by common or contract carriers.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-423

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-22 — November 25, 1957

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Sept. 28	93,122	Apr. 1-Sept. 29	64,393	Apr. 1-Oct. 1	118,609
Sept. 29-Oct. 5	18,083	Sept. 30-Oct. 6	9,974	Oct. 2-8	16,897
Oct. 6-12	17,974	Oct. 7-13	10,851	Oct. 9-15	11,133
Oct. 13-19	26,417	Oct. 14-20	14,131	Oct. 16-22	34,624
Oct. 20-26	20,986	Oct. 21-27	15,368	Oct. 23-29	24,684
Oct. 27-Nov. 2	23,167	Oct. 28-Nov. 3	12,524	Oct. 30-Nov. 5	22,472
Nov. 3-9	22,799	Nov. 4-10	17,208	Nov. 6-12	29,683
Nov. 10-16	28,849	Nov. 11-17	19,793	Nov. 13-19	36,289
Nov. 17-23	26,495	Nov. 18-24	12,013	Nov. 20-26	20,115
Total	277,892		176,255		314,506

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Nov. 10-16, 1957	99,429	5,322
Nov. 17-23, 1957	95,700	3,427
Nov. 18-24, 1956	45,167	961

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Sept. 28, 1957	372,486	48,329	13.0
Sept. 29-Oct. 5	72,334	3,847	5.3
Oct. 6-12	71,897	5,230	7.2
Oct. 13-19	105,667	3,924	3.7
Oct. 20-26	83,945	5,259	6.3
Oct. 27-Nov. 2	92,668	5,366	5.8
Nov. 3-9	91,194	6,484	7.1
Nov. 10-16	115,395	5,796	5.0
Nov. 17-23	105,981	6,059	5.7
Total	1,111,567	90,294	8.1

*Does not include drop lots transported by common or contract carriers.

AAC-433

David M. Biggar, Manager
Avocado Administrative Committee

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AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-27 — December 30, 1957

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Oct. 26	176,582	Apr. 1-Oct. 27	114,717	Apr. 1-Oct. 29	205,947
Oct. 27-Nov. 2	23,167	Oct. 28-Nov. 3	12,524	Oct. 30-Nov. 5	22,472
Nov. 3-9	22,799	Nov. 4-10	17,208	Nov. 6-12	29,683
Nov. 10-16	28,849	Nov. 11-17	19,793	Nov. 13-19	36,289
Nov. 17-23	26,495	Nov. 18-24	12,013	Nov. 20-26	20,115
Nov. 24-30	14,076	Nov. 25-Dec. 1	21,515	Nov. 27-Dec. 3	25,101
Dec. 1-7	22,945	Dec. 2-8	24,481	Dec. 4-10	24,298
Dec. 8-14	25,035	Dec. 9-15	20,614	Dec. 11-17	23,691
Dec. 15-21	16,455	Dec. 16-22	9,278	Dec. 18-24	12,104
Dec. 22-28	8,213	Dec. 23-29	8,011	Dec. 25-31	16,284
Total	364,616		260,154		415,984

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Dec. 15-21, 1957	56,174	3,216
Dec. 22-28, 1957	24,764	2,696
Dec. 23-29, 1956	29,923	707

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Oct. 26, 1957	706,329	66,589	9.4
Oct. 27-Nov. 2	92,668	5,366	5.8
Nov. 3-9	91,194	6,484	7.1
Nov. 10-16	115,395	5,796	5.0
Nov. 17-23	105,981	6,059	5.7
Nov. 24-30	56,304	5,150	9.1
Dec. 1-7	91,782	6,735	7.3
Dec. 8-14	100,141	5,762	5.8
Dec. 15-21	65,822	6,795	10.3
Dec. 22-28	32,852	6,013	18.3
Total	1,458,468	120,749	8.2

*Does not include drop lots transported by common or contract carriers.

AAC-442

David M. Biggar, Manager
Avocado Administrative Committee

AVOCADO ADMINISTRATIVE COMMITTEE
Homestead, Florida

1102 North Krome Avenue — Telephone CI 7-0848

Report No. 57/58-29 — January 13, 1958

Summary of Avocado Shipments from the South Florida Production Area

1957-58 Season		1956-57 Season		1955-56 Season	
Period	Bushels	Period	Bushels	Period	Bushels
Apr. 1-Nov. 30	291,968	Apr. 1-Dec. 1	197,770	Apr. 1-Dec. 3	339,607
Dec. 1-7	22,945	Dec. 2-8	24,481	Dec. 4-10	24,298
Dec. 8-14	25,035	Dec. 9-15	20,614	Dec. 11-17	23,691
Dec. 15-21	16,455	Dec. 16-22	9,278	Dec. 18-24	12,104
Dec. 22-28	8,213	Dec. 23-29	8,011	Dec. 25-31	16,284
Dec. 29-Jan. 4	10,404	Dec. 30-Jan. 5	17,411	Jan. 1-7	17,672
Jan. 5-11	24,979	Jan. 6-12	16,974	Jan. 8-14	21,675
Total	399,999		294,539		455,331

Avocado Shipments by Type of Container

	Standard Flats	Multilayer Boxes
Dec. 29-Jan. 4, 1958	30,998	3,539
Jan. 5-11, 1958	79,005	6,970
Jan. 6-12, 1957	62,516	1,793

Distribution 1957-58 Season

Period	Total Units Packed	Units for Florida Destinations*	Per Cent for Florida Destinations*
June 1-Nov. 30, 1957	1,167,871	95,444	8.2
Dec. 1-7	91,782	6,735	7.3
Dec. 8-14	100,141	5,762	5.8
Dec. 15-21	65,822	6,795	10.3
Dec. 22-28	32,852	6,013	18.3
Dec. 29-Jan. 4, 1958	41,615	5,729	13.8
Jan. 5-11	99,915	10,029	10.0
Total	1,599,998	136,507	8.5

*Does not include drop lots transported by common or contract carriers.

AAC-446

David M. Biggar, Manager
Avocado Administrative Committee

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AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

SUMMARY OF AVOCADO SHIPMENTS FROM THE SOUTH FLORIDA PRODUCTION AREA

June 1, 1957, through January 11, 1958

As derived from inspection certificates issued by the United States Department of Agriculture in cooperation with the Citrus and Vegetable Inspection Division of the Florida Department of Agriculture.

Shipped to Florida Destinations		Shipped to Out of State Destinations		Total Shipped	
Bushels	%	Bushels	%	Bushels	%
34,127	8.5	365,872	91.5	399,999	100

AAC-448

David M. Biggar, Manager
Avocado Administrative Committee

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1954-55 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	Piowaty	5	Oct. 14, 1954	Oct. 14, 1954	7.2
Lula	Aladay	5	Oct. 14	Oct. 14	5.5
Lula	Higgins	5	Oct. 14	Oct. 14	5.8
Lula	Biggers	5	Oct. 14	Oct. 14	8.0
Lula	V. Johnson	--	Oct. 13	Oct. 14	6.2
Lula	Higgins	5	Oct. 18	Oct. 18	8.3
Lula	Kent	5	Oct. 18	Oct. 18	6.8
Lula	Kent	5	Oct. 18	Oct. 18	6.9
Lula	--	5	Oct. 18	Oct. 18	6.9
Lula	McRae	5	Oct. 18	Oct. 18	5.2
Lula	Curtis	5	Oct. 18	Oct. 19	7.8
Lula	Curtis	5	Oct. 18	Oct. 19	6.7
Lula	Kip	5	Oct. 18	Oct. 19	6.8
Lula	Womecto	5	Oct. 19	Oct. 20	6.7
Lula	Kersten	6	Oct. 19	Oct. 20	6.6
Lula	Kersten	6	Oct. 19	Oct. 20	6.9
Lula	McBride	5	Oct. 19	Oct. 20	7.0
Lula	Worland	5	Oct. 19	Oct. 21	8.3
Booth 8	--	5	Oct. 26	Oct. 26	7.1
Lula	McMillan	5	Oct. 27	Oct. 28	7.9
Lula	Womecto	5	Oct. 27	Oct. 28	7.1
Lula	Curtis	5	Oct. 27	Oct. 28	9.2
Lula	Nichol	5	Oct. 27	Oct. 28	7.4
Lula	FLAG	5	Oct. 27	Oct. 28	7.8
Lula	Curtis	5	Oct. 27	Oct. 28	7.4
Lula	Gayton	5	Oct. 27	Oct. 29	9.0
Lula	Lillis	5	Oct. 27	Oct. 29	8.1
Lula	Curtis	5	Oct. 27	Oct. 29	8.8
Lula	Higgins	6	Oct. 28	Oct. 29	7.6
Blakeman	DeGuise	6	Oct. 28	Oct. 29	6.3
Blair	Aladay	5	Oct. 28	Oct. 29	8.1
Hall	--	--	Nov. 1	Nov. 1	6.1
Lula	--	--	Nov. 1	Nov. 1	7.6
Booth 1	--	--	Nov. 1	Nov. 1	8.8
Taylor	--	--	Nov. 1	Nov. 1	7.5
Lula	Kip	5	Nov. 1	Nov. 2	7.1
Booth 7	Kip	5	Nov. 1	Nov. 2	5.7
Hickson	--	5	Nov. 9	Nov. 10	8.3
Booth 3	--	9	Nov. 8	Nov. 10	9.6
Booth 3	English	5	Nov. 12	Nov. 12	7.2
Booth 7	English	5	Nov. 12	Nov. 12	7.4
Booth 3	FLAG	5	Nov. 12	Nov. 12	9.4
Booth	Piowaty	5	Nov. 12	Nov. 12	7.8
Booth 7	--	4	Nov. 12	Nov. 12	8.4
Booth 3	McBride	5	Nov. 12	Nov. 12	7.4
Blakeman	DeGuise	5	Nov. 17	Nov. 18	9.1

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8	9-15	14	--	9-27	12	--	--	--	--	10-10
Booth 7	10-15	16	--	11-1	--	--	--	--	--	11-1
Hickson	10-15	14	--	11-1	--	--	--	--	--	11-1
Blair	10-18	16	--	11-1	--	--	--	--	--	11-1
Lula	10-18	16	--	11-1	--	--	--	--	--	11-1
Blakeman	11-1	--	--	11-1	--	--	--	--	--	11-1
Hall	11-1	18	--	12-1	--	--	--	--	--	12-1
Taylor	11-1	12	--	11-15	--	--	--	--	--	11-15
Booth 1	11-15	16	--	12-1	--	--	--	--	--	12-1
Booth 3	11-5	14	--	12-1	--	--	--	--	--	12-1

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

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PLAINTIFFS' EXHIBIT 12

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1955-56 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	--	5	Oct. 17, 1955	Oct. 17, 1955	6.9
Lula	Higgins	4	Oct. 17	Oct. 17	6.3
Lula	Higgins	4	Oct. 17	Oct. 17	5.7
Lula	--	5	Oct. 20	Oct. 20	7.8
Taylor	Heuer	7	Oct. 21	Oct. 21	6.9
Lula	2	5	Oct. 21	Oct. 24	8.8
Lula	1	5	Oct. 21	Oct. 24	9.2
Hickson	--	5	Nov. 9	Nov. 9	6.8
Lula	FLAG	5	Nov. 10	Nov. 10	7.2
Lula	Drew	5	Nov. 10	Nov. 10	9.8
Lula	McBride	4	--	Nov. 10	11.7
Hickson	--	5	Nov. 10	Nov. 10	7.4
Lula	--	5	Nov. 10	Nov. 10	5.8
Lula	1	5	--	Nov. 14	8.8
Lula	2	5	--	Nov. 14	8.0
Lula	3	5	--	Nov. 14	10.8
Lula	4	5	--	Nov. 14	7.1
Lula	5	5	--	Nov. 14	9.7
Lula	6	5	Nov. 14	Nov. 15	7.7
Lula	7	5	Nov. 14	Nov. 15	8.3
Booth 7	--	5	Nov. 14	Nov. 15	7.4
Lula	8	5	Nov. 14	Nov. 15	8.3
Lula	1	6	Nov. 18	Nov. 18	7.4
Lula	1	1	Nov. 18	Nov. 18	6.4
Lula	1	1	Nov. 18	Nov. 18	7.9
Lula	2	6	Nov. 18	Nov. 18	8.1
Lula	2	1	Nov. 18	Nov. 18	6.3
Lula	2	1	Nov. 18	Nov. 18	7.5
Blakeman	--	5	Nov. 18	Nov. 18	3.7
Lula	Curtis	5	Nov. 23	Nov. 23	10.0
Lula	Kip	5	Nov. 23	Nov. 23	9.3
Blakeman	DeGuise	5	Nov. 30	Nov. 30	4.4
Booth 7	--	10	Dec. 5	Dec. 5	7.2
Booth 7	--	1	Dec. 5	Dec. 5	7.2
Booth 7	--	5	Dec. 8	Dec. 8	7.2
Taylor	--	1	Jan. 3, 1956	Jan. 3, 1956	12.8
Taylor	--	8	Jan. 3	Jan. 3	11.0
Taylor	--	1	Jan. 3	Jan. 3	10.4

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-3	18	3 10/16	10-17	16	3 7/16	--	--	--	--
(	--	--	--	10-31	14	3 4/16	11-14	11	2 15/16	12-12
Booth 7	10-10	16	3 9/16	10-24	14	3 7/16	11-7	10	3 1/16	11-21
Hickson	10-17	14	3 4/16	10-31	10	2 15/16	11-14	8	2 12/16	12-5
Taylor	11-7	14	3 5/16	11-28	12	3 2/16	12-12	9	2 13/16	1-2

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1956-57 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	--	6	Oct. 29, 1956	Oct. 30, 1956	5.7
Lula	--	6	Nov. 12	Nov. 12	6.8
Lula	1	6	Nov. 14	Nov. 15	7.4
Lula	2	6	Nov. 14	Nov. 15	6.8
Lula	3	6	Nov. 14	Nov. 15	7.6
Lula	Higgins	5	Nov. 15	Nov. 15	7.4
Lula	6	6	Nov. 15	Nov. 15	6.8
Lula	5	6	Nov. 14	Nov. 16	5.8
Lula	4	6	Nov. 14	Nov. 16	8.6
Hall	--	2	Nov. 15	Nov. 16	6.4
Lula	1	6	Nov. 19	Nov. 20	7.2
Lula	2	6	Nov. 19	Nov. 20	8.6
Lula	3	6	Nov. 19	Nov. 20	6.6
Lula	4	6	Nov. 19	Nov. 20	6.8
Lula	1	6	Nov. 26	Nov. 26	6.1
Lula	2	7	Nov. 26	Nov. 26	7.6
Lula	3	7	Nov. 26	Nov. 26	7.5
Lula	4	7	Nov. 26	Nov. 26	7.6
Lula	5	6	Nov. 26	Nov. 26	7.4
Lula	1	6	Nov. 27	Nov. 27	6.8
Lula	2	7	Nov. 27	Nov. 27	7.9
Lula	1	6	Nov. 29	Nov. 29	6.9
Lula	2	6	Nov. 29	Nov. 29	7.2
Lula	3	6	Nov. 29	Nov. 29	8.0
Lula	4	6	Nov. 29	Nov. 29	7.3
Lula	1	6	Dec. 3	Dec. 3	8.0
Lula	2	6	Dec. 3	Dec. 3	7.8
Lula	3	6	Dec. 3	Dec. 3	6.8
Lula	4	6	Dec. 3	Dec. 3	8.7
Lula	1	6	Dec. 4	Dec. 4	9.1
Lula	2	6	Dec. 4	Dec. 4	8.5
Lula	3	6	Dec. 4	Dec. 4	8.5
Lula	4	6	Dec. 4	Dec. 4	6.7
Booth 1	Higgins	6	Dec. 4	Dec. 4	10.0
Booth 1	Higgins	7	Dec. 4	Dec. 4	9.3
Lula	Higgins	6	Dec. 4	Dec. 5	8.0
Lula	5	6	Dec. 4	Dec. 5	7.4
Lula	6	6	Dec. 5	Dec. 5	7.2
Lula	7	6	Dec. 5	Dec. 5	8.6
Lula	--	6	Dec. 6	Dec. 6	8.3
Taylor	Higgins	6	Dec. 10	Dec. 10	7.8
Taylor	Higgins	6	Dec. 10	Dec. 10	7.7

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-8	18	3 10/16	10-22	16	3 7/16	--	--	--	--
(	--	--	--	11-5	14	3 4/16	12-3	11	2 15/16	12-10
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7

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UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF FLORIDA LIME & AVOCADO GROWERS, INC.

1957-58 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	1	8	--	Oct. 8, 1957	5.6
Lula	2	6	--	Oct. 8	6.6
Lula	1	6	Oct. 28, 1957	Oct. 28	6.8
Lula	2	6	Oct. 28	Oct. 28	6.8
Lula	1	6	Nov. 6	Nov. 6	7.4
Lula	2	6	Nov. 6	Nov. 6	7.0
Lula	3	6	Nov. 6	Nov. 6	6.8
Lula	4	6	Nov. 6	Nov. 6	7.2
Lula	1	6	Nov. 12	Nov. 12	8.2
Lula	1	6	Nov. 12	Nov. 13	8.7
Lula	2	6	Nov. 12	Nov. 13	8.5
Lula	3	6	Nov. 12	Nov. 13	8.5
Booth 8	1	6	Nov. 13	Nov. 13	5.6
Booth 8	2	6	Nov. 13	Nov. 13	7.1
Booth 8	3	6	Nov. 13	Nov. 13	6.8
Booth 8	4	6	Nov. 13	Nov. 13	6.8
Lula	1	6	Nov. 12	Nov. 14	8.5
Lula	2	6	--	Nov. 14	6.6
Lula	3	6	--	Nov. 14	8.2
Lula	4	6	--	Nov. 14	8.9
Lula	5	6	--	Nov. 14	7.6
Lula	1	6	Nov. 25	Nov. 26	8.5
Lula	2	6	Nov. 25	Nov. 26	8.0
Lula	3	6	Nov. 25	Nov. 26	8.6

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8(	9-16	15	3 6/16	9-30	13	3 4/16	--	--	--	--
(	--	--	--	10-14	11	3 1/16	10-28	10	2 15/16	11-18
Lula(	10-7	18	3 10/16	10-21	16	3 7/16	--	--	--	--
(	--	--	--	11-4	14	3 4/16	11-18	11	2 15/16	12-9

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1954-55 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Hickson	Chandler	--	Oct. 14, 1954	Oct. 14, 1954	8.1
Hickson	--	--	Oct. 14	Oct. 14	6.7
Lula	Chandler	--	Oct. 13	Oct. 14	6.3
Lula	Chandler	--	Oct. 13	Oct. 14	5.2
Camp	Camp	--	Oct. 13	Oct. 14	7.3
Lula	English	5	Oct. 19	Oct. 21	7.2
Lula	Chandler	--	Oct. 20	Oct. 21	6.5
Hickson	Chandler	--	Oct. 20	Oct. 21	7.6
Hickson	Kendall	--	Oct. 20	Oct. 21	7.9
Lula	Lowa	5	Oct. 21	Oct. 21	5.7
Lula	McMillan	--	Oct. 20	Oct. 21	7.0
Camp	Camp	--	Oct. 20	Oct. 21	6.4
Lula	Chandler	--	Oct. 20	Oct. 21	6.3
Lula	Peters	--	Oct. 20	Oct. 21	7.3
Hickson	Kendall	5	Oct. 27	Oct. 27	8.4
Hickson	Chandler	5	Oct. 27	Oct. 27	9.6
Lula	5A	5	Oct. 27	Oct. 27	5.5
Lula	Harrison	5	Oct. 27	Oct. 27	6.9
Lula	Princeton	5	Oct. 27	Oct. 28	6.1
Lula	Jeron	5	Oct. 27	Oct. 28	7.7
Lula	Peters	5	Oct. 27	Oct. 28	7.8
Vaca	Krome	--	Oct. 28	Oct. 29	8.2
Lula	Krome	--	Oct. 29	Oct. 29	4.7
Lula	Krome	--	Oct. 29	Oct. 29	5.0
Lula	Krome	--	Oct. 29	Oct. 29	5.5
Lula	Krome	--	Oct. 29	Oct. 29	5.7
Lula	Futch	9	--	Nov. 2	6.3
Booth 7	Futch	8	--	Nov. 2	4.1
Lula	--	--	Nov. 1	Nov. 3	6.4
Lula	--	--	Nov. 1	Nov. 3	6.0
Booth 8	--	--	Nov. 1	Nov. 3	5.5
Booth 8	--	--	Nov. 1	Nov. 3	5.7
Lula	Harrison	5	Nov. 4	Nov. 4	6.6
Lula	Princeton	5	Nov. 4	Nov. 4	5.7
Lula	Peters	5	Nov. 4	Nov. 5	8.3
Lula	Chandler 5A	5	Nov. 4	Nov. 5	6.5
Lula	Jeron	5	Nov. 4	Nov. 5	7.8
Lula	McMillan	5	Nov. 4	Nov. 5	7.7
Booth 7	--	11	Nov. 8	Nov. 10	7.7
Booth 7	Futch				
Lula	Kinard	2	Nov. 10	Nov. 12	9.6
Camp	Camp	8	--	Nov. 17	9.2
Lula	McMillan	5	Nov. 17	Nov. 18	8.3
Lula	Kinard	10	Nov. 18	Nov. 18	9.6
Lula	Kinard	9	Nov. 18	Nov. 18	9.0
Lula	Kinard	5	Nov. 18	Nov. 18	8.8
Lula	Harrison	5	Nov. 17	Nov. 18	8.3
Lula	Ch 5A	5	Nov. 17	Nov. 18	6.7
Taylor	Ch 5A	5	Nov. 17	Nov. 18	8.8
Booth 7	Cox	6	Nov. 17	Nov. 18	9.5
Lula	Peters	5	Nov. 17	Nov. 18	8.8
Lula	Jeron	5	Nov. 17	Nov. 18	9.2
Booth 3		5	Nov. 17	Nov. 19	10.0

*Variety	1		Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8	9-15	14	--	9-27	12	--	--	--	--	10-10
Vaca	10-6	14	--	10-20	--	--	--	--	--	10-20
Booth 7	10-15	16	--	11-1	--	--	--	--	--	11-1
Hickson	10-15	14	--	11-1	--	--	--	--	--	11-1
Lula	10-18	16	--	11-1	--	--	--	--	--	11-1
Taylor	11-1	12	--	11-15	--	--	--	--	--	11-15
Booth 3	11-5	14	--	12-1	--	--	--	--	--	12-1

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

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PLAINTIFFS' EXHIBIT 13

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UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1955-56 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Booth 3	Camp	6	Nov. 19, 1955	Nov. 19, 1955	6.9
Booth 3	Camp	6	Nov. 14	Nov. 19	8.0
Lula	Camp	6	Nov. 23	Nov. 23	8.0
Booth 3	Camp	6	Nov. 23	Nov. 23	6.2

*Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-3	18	3 10/16	10-17	16	3 7/16	--	--	--	--
(	--	--	--	10-31	14	3 4/16	11-14	11	2 15/16	12-12
Booth 3	10-31	16	3 10/16	11-14	14	3 8/16	11-28	10	3 1/16	12-12

*Shipping dates authorized by regulations of U. S. Secretary of Agriculture under South Florida Federal Marketing Agreement

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1956-57 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	Sagehorn	6	Nov. 9, 1956	Nov. 13, 1956	8.3
Vaca	Krome	10	Nov. 12	Nov. 13	7.1
Booth 7	Krome	10	Nov. 12	Nov. 13	4.4
Lula	1	6	Nov. 19	Nov. 21	7.4
Lula	--	6	Nov. 21	Nov. 21	6.1
Lula	--	6	Nov. 21	Nov. 21	6.4
Lula	McMillan	6	Nov. 19	Nov. 21	7.6
Lula	Serlecte	6	Nov. 19	Nov. 21	8.6
Lula	Warwick	6	Nov. 20	Nov. 21	8.8
Lula	J-F	6	Nov. 20	Nov. 23	7.4
Lula	Sagehorn	6	Nov. 21	Nov. 23	7.7
Lula	Melfeld	6	Nov. 26	Nov. 26	8.0
Lula	J-F	6	Nov. 27	Nov. 28	9.8
Booth 1	J-F	6	Nov. 27	Nov. 28	9.9
Booth 1	Rivers	6	Nov. 28	Nov. 28	8.4
Booth 3	--	6	Nov. 28	Nov. 28	9.2
Booth 1	Camp	6	Nov. 28	Nov. 28	9.4
Lula	Camp	6	Nov. 28	Nov. 28	5.8
Taylor	Camp	6	Nov. 28	Nov. 28	8.2
Booth 3	Barnum	6	Dec. 4	Dec. 4	7.6
Lula	6	6	Dec. 5	Dec. 5	9.0
Lula	5	6	Dec. 5	Dec. 5	9.2
Booth 7	7	6	Dec. 5	Dec. 5	5.1
Booth 7	8	6	Dec. 5	Dec. 5	7.1
Booth 7	9	6	Dec. 5	Dec. 5	5.0
Lula	1	6	Dec. 5	Dec. 5	7.8
Lula	2	6	Dec. 5	Dec. 5	6.7
Lula	3	6	Dec. 5	Dec. 5	9.2
Lula	4	6	Dec. 5	Dec. 5	8.6
Vaca	Krome	6	Dec. 5	Dec. 6	11.5
Lula	1	6	Dec. 5	Dec. 6	11.2
Lula	3	6	Dec. 5	Dec. 6	7.6
Booth 6	6	6	Dec. 6	Dec. 6	6.0
Booth 3	5	6	Dec. 6	Dec. 6	8.8
Booth 1	7	6	Dec. 6	Dec. 6	9.7
Lula	7	6	Dec. 6	Dec. 7	7.6
Lula	6	6	Dec. 6	Dec. 7	6.7
Taylor	5	6	Dec. 7	Dec. 7	9.0
Hickson	3	6	Dec. 7	Dec. 7	7.8
Booth 3	2	6	Dec. 7	Dec. 7	7.2
Lula	2	6	Dec. 7	Dec. 7	7.2
Booth 1	4	6	Dec. 7	Dec. 7	7.4
Lula	9	6	Dec. 7	Dec. 7	8.8
Lula	8	6	Dec. 7	Dec. 7	7.7
Lula	10	6	Dec. 7	Dec. 7	7.8
Lula	Camp	6	Dec. 10	Dec. 10	7.9
Booth 7B	--	6	Dec. 13	Dec. 14	9.6
Booth 3	--	6	Dec. 13	Dec. 14	10.2
Collinson	--	6	Dec. 14	Dec. 14	8.4
Herman	--	6	Dec. 14	Dec. 14	8.1
Collinson	PH	6	Dec. 14	Dec. 14	7.6
Lula	Camp	6	Dec. 17	Dec. 17	6.8
Lula	Camp	6	Dec. 17	Dec. 18	6.6

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Lula(	10-8	18	3 10/16	10-22	16	3 7/16	--	--	--	-
(	--	--	--	11-5	14	3 4/16	12-3	11	2 15/16	12-10
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-3
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-3
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-10
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-10
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-24
Booth 7B	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-31
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Booth 3	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7

[Fol. 380]

UNIVERSITY OF FLORIDA SUBTROPICAL EXPERIMENT STATION

OIL CONTENT TESTS OF FLORIDA AVOCADOS MADE AT EXPERIMENT STATION, HOMESTEAD, FLORIDA, AT REQUEST OF SOUTH FLORIDA GROWERS ASSN., INC.

1957-58 Season

Variety	Grove	Size of Sample	Date Picked	Date Tested	% Oil
Lula	1	6	Oct. 31, 1957	Nov. 1, 1957	6.8
Lula	2	6	Oct. 31	Nov. 1	6.6
Lula	3	6	Oct. 31	Nov. 1	8.3
Lula	1	6	Nov. 4	Nov. 4	8.7
Lula	2	6	Nov. 4	Nov. 4	7.8
Lula	3	6	Nov. 4	Nov. 4	8.1
Lula	3	6	Nov. 5	Nov. 5	8.7
Lula	2	6	Nov. 5	Nov. 5	7.7
Lula	1	6	Nov. 5	Nov. 5	7.6
Lula	1	6	Nov. 6	Nov. 6	8.9
Lula	2	6	Nov. 6	Nov. 6	7.5
Lula	3	6	Nov. 6	Nov. 6	7.3
Lula	1	6	Nov. 7	Nov. 8	7.8
Lula	2	6	Nov. 7	Nov. 8	8.9
Lula	3	6	Nov. 7	Nov. 8	8.8
Lula	4	6	Nov. 7	Nov. 8	8.6
Lula	5	6	Nov. 7	Nov. 8	9.1
Lula	6	6	Nov. 7	Nov. 8	8.2
Booth 7	1	6	Nov. 12	Nov. 12	8.1
Lula	2	6	Nov. 12	Nov. 12	8.2
Lula	3	6	Nov. 12	Nov. 12	8.7
Lula	4	6	Nov. 12	Nov. 12	7.8
Lula	5	6	Nov. 12	Nov. 12	7.8
Booth 3	6	6	Nov. 12	Nov. 12	9.1
Booth 8	--	6	--	Nov. 18	7.3
Booth 8	--	6	--	Nov. 18	8.2
Booth 8	--	6	--	Nov. 18	6.8

SHIPPING DATES AUTHORIZED BY REGULATIONS OF U. S. SECRETARY OF AGRICULTURE UNDER SOUTH FLORIDA FEDERAL MARKETING AGREEMENT

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Booth 8(	9-16	15	3 6/16	9-30	13	3 4/16	--	--	--	--
(	--	--	--	10-14	11	3 1/16	10-28	10	2 15/16	11-18
Lula(	10-7	18	3 10/16	10-21	16	3 7/16	--	--	--	--
(	--	--	--	11-4	14	3 4/16	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31

AVOCADO SHIPPING DATES
1956-57 Season

Variety	Date A	Min Wt	Min Dia	Date B	Min Wt	Min Dia	Date C	Min Wt	Min Dia	Date D
Fuchs	6-18	12	3 1/16	7-2	10	2 13/16	7-16	8	2 9/16	8-6
Pollock	7-2	18	3 10/16	7-16	15	3 6/16	7-30	12	3 1/16	8-27
Simmonds	7-2	16	3 9/16	7-16	14	3 7/16	7-30	12	3 4/16	8-27
Nadir	7-2	14	3 5/16	7-16	12	3 2/16	7-30	9	2 12/16	8-27
Hardee	7-2	16	3 5/16	7-16	14	3 2/16	7-30	10	2 12/16	8-27
Trapp	7-23	14	3 9/16	8-6	12	3 7/16	8-20	10	3 3/16	9-17
Waldin	7-30	16	3 9/16	8-13	14	3 6/16	8-27	10	3 1/16	10-15
Peterson	8-6	12	3 6/16	8-20	10	3 2/16	9-3	8	2 14/16	9-24
Pinelli	8-20	18	--	8-27	16	--	9-3	12	--	9-24
Tonnage	8-20	14	--	8-27	12	--	9-3	10	--	9-24
Fairchild	8-20	16	3 10/16	9-3	14	3 7/16	9-17	10	3 0/16	10-1
(Booth 8	9-17	15	3 6/16	9-24	13	3 4/16	10-15	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	11-5	9	2 14/16	11-26
Nirody	9-17	18	3 15/16	10-1	15	3 11/16	10-15	10	3 3/16	11-5
Simpson	10-1	16	--	10-15	14	--	10-29	10	--	11-19
(Lula	10-8	18	3 10/16	10-22	16	3 7/16	11-5	14	3 4/16	--
(Lula	--	--	--	--	--	--	[redacted]	11	2 15/16	12-10
Rue	10-8	30	4 3/16	10-15	24	3 15/16	10-29	18	3 9/16	11-12
Black Prince	10-8	16	--	10-22	14	--	11-5	10	--	11-26
Booth 7	10-15	16	3 10/16	10-29	14	3 8/16	11-12	10	3 2/16	12-3
Sherman	10-15	16	--	10-29	14	--	11-12	10	--	12-3
Vaca	10-15	16	3 9/16	10-29	14	3 7/16	11-12	10	3 0/16	12-3
Marcus	10-15	32	--	--	--	--	--	--	--	11-26
Hickson	10-22	14	3 4/16	11-5	11	3 0/16	11-19	9	2 13/16	12-10
Collinson	10-22	16	3 11/16	11-5	14	3 8/16	11-19	10	3 1/16	12-10
Avon	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Booth 5	10-22	16	3 11/16	11-5	14	3 9/16	11-19	9	3 1/16	12-10
Blair	10-22	16	--	11-5	14	--	11-19	9	--	12-10
Nelson	10-22	14	3 8/16	11-5	12	3 5/16	11-19	9	2 15/16	12-10
Monroe	10-29	24	--	11-26	20	--	12-17	14	--	1-7
Hall	11-5	20	3 9/16	11-19	16	3 5/16	12-3	14	3 3/16	12-24
Herman	11-5	16	3 9/16	11-19	14	3 7/16	12-3	10	3 1/16	12-24
Winslowson	11-5	18	3 14/16	11-19	16	3 12/16	12-3	10	3 2/16	12-24
Booth 10	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Booth 11	11-5	16	--	11-19	14	--	12-3	9	--	12-24
Ajax(Booth 7B)	11-12	18	3 12/16	11-26	15	3 9/16	12-10	11	3 3/16	12-31
Booth 3	11-19	16	3 9/16	12-3	14	3 7/16	12-17	10	3 1/16	1-7
Booth 1	11-19	16	3 11/16	12-3	14	3 8/16	12-17	10	3 1/16	1-7
Taylor	11-19	14	3 4/16	12-3	12	3 2/16	12-17	9	2 13/16	1-7
Dunedin	11-19	16	3 10/16	12-3	14	3 8/16	12-17	9	2 15/16	1-7
Choquette	11-26	24	--	12-10	18	--	12-[illegible]	14	--	[illegible] 12-31
Linda	12-10	18	--	12-24	15	--	1-7	12	--	1-21
Byars-1	12-10	16	--	12-24	14	--	1-7	9	--	1-28
Nabal	12-10	14	3 8/16	12-24	12	3 5/16	1-7	8	2 14/16	1-28
Wagner	12-17	12	3 5/16	12-31	10	3 2/16	1-14	8	2 14/16	2-4
Schmidt	1-28	16	--	2-11	14	--	--	--	--	2-25
Itzamna	2-25	--	--	--	--	--	--	--	--	2-25

Date "A" No fruit may be shipped before this date.
Date "D" No restrictions on size or weight after this date.
Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
All weights in ounces, diameters in inches.

Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations:

West Indian Type: None before June 1.
June 1 to June 18, none smaller than 16 oz.
June 18 to July 16, none smaller than 14 oz.
July 16 to Sept. 10, none smaller than 12 oz.
After Sept. 10, no restrictions.

Guatemalan Type and Guatemalan x W. Indian Hybrids: None before Sept. 3.
Sept. 3 to Oct. 1, none smaller than 14 oz.
Oct. 1 to Dec. 17, none smaller than 12 oz.
After Dec. 17, no restrictions.

Exceptions applicable to seedlings and unlisted varieties: Avocados which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

This schedule voids and supersedes the schedules shown on AAC-234 and AAC-247.

AAC-267

[Fol. 839]
PLAINTIFFS' EXHIBIT 14
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PLAINTIFFS' EXHIBIT 15

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CIrcle 7-0848

Bulletin No. 57/58-2 May 15, 1957

To: All Growers and Handlers of Avocados Grown in South Florida

Subject: Seedling Maturity Regulations Recommended; Assessment Rate Reduced

Your Avocado Administrative Committee met on Tuesday, May 14th, for the announced purpose of considering regulations for recommendation to the Secretary of Agriculture. Action was taken at this meeting to recommend the following maturity restrictions:

1. Prohibit the shipment of all varieties of avocados listed in regulations governing last season's operations until such time as dates, weights and/or sizes can be established for the individual varieties (schedules for Fuchs, Pollocks, Simmonds and other summer varieties to be established at the June 11th meeting).

2. Restrict the movement of West Indian type seedlings and unlisted varieties as follows:

   None to be shipped before June 3
   June 3 through June 16 - 16 oz. minimum weight
   June 17 through July 14 - 14 oz. minimum weight
   July 15 through September 8 - 12 oz. minimum weight
   On and after September 9 - no size restrictions

   (Provided that avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.)

An operating budget of $13,420 was recommended by the Committee for the 1957-58 season, to be financed by an assessment of 3 cents per bushel applicable to all avocados shipped. This assessment rate reflects a reduction by 25 per cent of the assessment rate applicable during previous seasons.

Action has also been taken to eliminate cull avocados from early shipments from Florida. The Committee was polled concerning grade restrictions and has recommended to the Secretary of Agriculture that he prohibit the shipment of avocados which fail to meet the minimum requirements of the Number Two Grade, including standard pack provisions.

The next regular meeting of the Avocado Administrative Committee has been scheduled for 9:30 A. M., June 11, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida. All meetings are open to the public and all interested persons are urged to attend and participate in the discussions.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-361

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CIrcle 7-0848

Bulletin No. 57/58-3 June 13, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Maturity Schedule for Summer Varieties

Your Avocado Administrative Committee met on Tuesday, June 11, 1957, and recommended the following shipping schedule for the major summer varieties:

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
Notice of the Secretary's approval has been received and is on file in this office.

The following regulations were already in effect for seedlings and all varieties not listed on last season's shipping schedule (AAC-267).
None to be shipped before June 3
June 3 through June 16 - 16 oz. minimum weight
June 17 through July 14 - 14 oz. minimum weight
July 15 through September 8 - 12 oz. minimum weight
On and after September 9 - no size restrictions
(Provided that avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.)

The shipping dates and weights for all other varieties listed on last season's schedule remain unchanged, pending further recommendations as the season progresses. Dates will be reviewed for Waldin and Trapp avocados at the July meeting.

An announcement was made at Tuesday's meeting naming the following subcommittees for the study of problems in specific fields:

BUDGET AND FINANCE
R. R. Kinard, Chairman
D. S. Ames
T. P. Clinard

CONTAINER RESEARCH
F. M. Kent, Chairman
J. A. Cox
C. J. Parman

MATURITY
W. H. Krome, Chairman
D. S. Ames
T. P. Clinard

GRADES
H. E. Kendall, Chairman
J. R. Brooks
G. H. Cooper
I. E. Futch
C. M. Russell

RULES, REPORT FORMS AND HANDLER REGISTRATION
G. F. Ward, Chairman
E. A. Frasier
T. D. Lewis
H. Lucerne
W. Peterson

VARIETY IDENTIFICATION PANEL
J. D. Conner
L. Hilliard
E. J. Norman
H. Robertson
G. D. Ruehle

The next regular meeting of the Avocado Administrative Committee has been scheduled for 9:30 A. M., July 9, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida. All meetings are open to the public and all interested persons are urged to attend and to participate in the discussions.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-372

[fol. 334]

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

Bulletin 57/58-5 July 11, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Weights, Dates and Sizes Established for Five Additional Varieties

Your Avocado Administrative Committee met on Tuesday, July 9, 1957, and approved shipping dates, weights and sizes for the Trapp, Waldin, Petersen, Pinelli and Tonnage varieties. Regulations based upon the Committee's recommendations are expected to become effective before July 22nd, at which time the general stop order applicable to the shipment of the first of these varieties expires. Maturity regulations recommended or now in effect are as follows:

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.

The following regulations were already in effect for seedlings and all varieties not listed on last season's shipping schedule (AAC-267).
None to be shipped before June 3
June 3 through June 16 - 16 oz. minimum weight
June 17 through July 14 - 14 oz. minimum weight
July 15 through September 8 - 12 oz. minimum weight
On and after September 9 - no size restrictions
(Provided that avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown which which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.)

The shipping dates and weights for all other varieties listed on last season's schedule remain unchanged, pending further recommendations as the season progresses.

Your Avocado Administrative Committee also recommended to the Secretary of Agriculture that container regulations be amended to facilitate the shipment of gift packages for the Christmas trade. It has been recommended that, effective December 1st through December 31st of each year, the handling of avocados in any container containing less than 15 pounds net weight of avocados be permitted; Provided, That each such container is individually addressed to and designated for a separate and distinct individual consignee and that the avocados therein meet with all other requirements of the Secretary's Orders applicable to the handling of avocados grown in South Florida.

It was announced at Tuesday's meeting that U. S. Grades for Florida avocados are being processed for application in the near future. The proposed U. S. Grades closely parallel existing Avocado Administrative Committee grades now in effect.

The next regular meeting of the Avocado Administrative Committee has been scheduled for 9:30 A. M., August 13, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida. All meetings are open to the public and all interested persons are urged to attend and to participate in the discussions.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-384

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

Bulletin No. 57/58-6 August 14, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Shipping Weights, Dates and Sizes Proposed for Fall Varieties

Your Avocado Administrative Committee met on Tuesday, August 13, 1957, and gave consideration to proposed shipping schedules for several additional varieties of avocados. However, only one additional variety, the Fairchild, was placed on the recommended picking schedule. Maturity regulations recommended or now in effect are as follows:

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	xxxx	xx	xxxxxxx	xxxx	xx	xxxxxx	xxxx	xx	xxxxxxx	8-5
Pollock	xxxx	xx	xxxxxxx	xxxx	xx	xxxxxx	8-5	14	3 5/16	8-26
Simmonds	xxxx	xx	xxxxxxx	xxxx	xx	xxxxxx	8-5	12	3 4/16	8-26
Hardee	xxxx	xx	xxxxxxx	xxxx	xx	xxxxxx	7-29	12	2 15/16	8-26
Nadir	xxxx	xx	xxxxxxx	xxxx	xx	xxxxxx	8-5	10	2 14/16	9-2
Trapp	xxxx	xx	xxxxxxx	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
The following regulations were already in effect for West Indian seedlings and all varieties not listed on last season's shipping schedule (AAC-267).
July 15 through September 8 - 12 oz. minimum weight
On and after September 9 - no size restrictions
(Provided that avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped, without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.)
The shipping dates and weights for Guatemalan and hybrid seedlings and all other varieties listed on last season's schedule remain unchanged, pending further recommendations as the season progresses.

Tentative approval was given to the following shipping schedule, with final action deferred on all varieties except Booth 8 until the September 10th meeting. A special telephone meeting will be conducted on September 3rd to determine the Committee's recommendations relative to advancing the dates for the Booth 8 variety.

THIS IS A PRELIMINARY SCHEDULE AND AS YET HAS NO OFFICIAL STATUS.

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Nirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
(Booth 8	9-23	16	3 7/16	9-30	14	3 5/16	10-14	12	3 2/16	--
(Booth 8	--	--	--	--	--	--	11-4	10	2 15/16	11-25
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 3/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
B.Prince	10-7	16		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	--
(Lula	--	--	--	--	--	--	12-3	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								11-25

Since this is only a preliminary proposed schedule, you are advised to check the final picking schedule, as will be shown on a later bulletin, before picking any of these varieties for market.

The next regular meeting of the Avocado Administrative Committee has been scheduled for 9:30 A. M., September 10, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida. All meetings are open to the public, and all interested persons are urged to attend.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-395

[fol. 336]

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

Bulletin No. 57/58-7 September 11, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Shipping Schedule for Early Fall Varieties and Proposed Schedule for Late Fall and Winter Varieties

Your Avocado Administrative Committee met on September 3rd and September 10th and added ten named varieties and the Guatemalan and hybrid type seedlings to the list of recommended shipping dates. The entire list of recommended maturity regulations has been reproduced in a single schedule (form AAC-407), a copy of which is enclosed with this bulletin. This schedule of shipping dates will be revised as additional variety regulations are recommended and you will be supplied with an up-to-date copy as each revision is issued.

The Maturity Subcommittee has submitted the following proposed schedule of maturity regulations for the remainder of the varieties which are to be regulated under individual maturity standards. Final action on these proposed recommendations has been deferred until the October 8th meeting to allow late developments to be taken into consideration and to permit interested persons to evaluate the proposed schedule.

THIS IS A PRELIMINARY SCHEDULE AND HAS NO OFFICIAL STATUS

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Hickson	10-21	14	3 4/16	11-4	12	3 1/16	11-18	10	2 15/16	12-9
Collinson	10-21	16	3 11/16	11-4	14	3 8/16	11-18	10	3 1/16	12-9
Avon	10-21	14	3 8/16	11-4	12	3 5/16	11-18	9	2 15/16	12-9
Booth 5	10-21	16	3 11/16	11-4	14	3 9/16	11-18	10	3 3/16	12-9
Blair	10-21	16		11-4			11-18			12-9
Nelson	10-21	14	3 8/16	11-4	12	3 5/16	11-18	10	3 1/16	12-9
Winslowson	10-28	18	3 14/16	11-11	16	3 12/16	11-25	10	3 2/16	12-24
Monroe	10-28	24		11-25	20		12-16	14		1-6
Hall	11-4	20	3 9/16	11-18	16	3 5/16	12-2	14	3 3/16	12-24
Herman	11-4	16	3 9/16	11-18	14	3 7/16	12-2	10	3 1/16	12-24
Booth 10	11-4	16		11-18	14		12-2	10		12-24
Booth 11	11-4	16		11-18	14		12-2	10		12-24
Ajax (Booth 7B)	11-11	18	3 12/16	11-25	15	3 9/16	12-9	11	3 3/16	12-31
Booth 3	11-11	16	3 9/16	11-25	14	3 7/16	12-9	10	3 1/16	12-31
Booth 1	11-18	16	3 11/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Taylor	11-18	14	3 4/16	12-2	12	3 2/16	12-16	9	2 13/16	1-6
Dunedin	11-18	16	3 10/16	12-2	14	3 8/16	12-16	10	3 1/16	1-6
Choquette	11-18	22		12-2	18		12-16	14		1-6
Linda	12-9	18		12-23	15		1-6	12		1-20
Byars #1	12-9	16		12-23	14		1-6	10		1-27
Nabal	12-9	14	3 8/16	12-23	12	3 5/16	1-6	9	3 0/16	1-27
Wagner	12-16	12	3 5/16	12-30	10	3 2/16	1-13	8	2 14/16	2-3
Schmidt	1-27	16		2-10	14					2-24
Itzamna	2-24									2-24

Since this is only a preliminary proposed schedule, you are advised to check the final shipping dates, weights and sizes as they appear on the recommended and approved schedule before picking any of these varieties for market.

It has been recommended to the Secretary of Agriculture that seedling regulations be amended to give authority to the Inspection Service to classify avocados claimed to be seedlings, but closely resembling a named and regulated variety, as that "type" and to apply the same maturity specifications as are applicable to the named variety.

United States Standards for Florida Avocados, describing the U. S. No. 1, U. S. No. 2, U. S. No. 3 and U. S. Combination Grades, became effective on September 3, 1957. The U. S. Grades closely parallel the Florida Avocado Committee Grades but have not yet been adopted as the official standards under the Avocado Marketing Agreement and Order. A limited number of copies of these U. S. Grade Standards are available for distribution from the Committee office.

The next regular meeting of the Avocado Administrative Committee has been scheduled for 9:30 A. M., October 8, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida. All meetings are open to the public, and all interested persons are urged to attend.

David H. Blanpied, Manager

AVOCADO SHIPPING DATES
1957-58 Season

Variety	Date A	Min. Wt.	Min. Diam.	Date B	Min. Wt.	Min. Diam.	Date C	Min. Wt.	Min. Diam.	Date D
Fuchs	6-17	12	3 1/16	7-1	11	2 15/16	7-15	10	2 13/16	8-5
Pollock	7-1	18	3 11/16	7-22	16	3 8/16	8-5	14	3 5/16	8-26
Simmonds	7-1	16	3 9/16	7-22	14	3 7/16	8-5	12	3 4/16	8-26
Hardee	7-1	16	3 5/16	7-15	14	3 2/16	7-29	12	2 15/16	8-26
Nadir	7-8	14	3 5/16	7-22	12	3 2/16	8-5	10	2 14/16	9-2
Trapp	7-29	14	3 9/16	8-12	12	3 7/16	8-26	10	3 3/16	9-16
Waldin	8-5	16	3 9/16	8-19	14	3 6/16	9-2	11	3 2/16	9-30
Petersen	8-5	12	3 6/16	8-19	11	3 4/16	9-2	10	3 2/16	9-23
Pinelli	8-19	18		8-26	16		9-2	12		9-23
Tonnage	8-26	14	3 5/16	9-2	12	3 2/16	9-9	10	2 14/16	9-23
Fairchild	8-26	16	3 10/16	9-9	14	3 7/16	9-23	11	3 2/16	10-7
(Booth 8	9-16	15	3 6/16	9-30	13	3 4/16	10-14	11	3 1/16	--
(Booth 8	--	--	--	--	--	--	10-28	10	2 15/16	11-18
Nirody	9-16	18	3 15/16	9-30	15	3 11/16	10-14	12	3 6/16	11-4
Simpson	9-30	16		10-14	14		10-28	10		11-18
Rue	10-7	30	4 3/16	10-14	24	3 15/16	10-28	18	3 9/16	11-11
B. Prince	10-7	16		10-21	14		11-4	10		11-25
(Lula	10-7	18	3 10/16	10-21	16	3 7/16	11-4	14	3 4/16	--
(Lula	--	--	--	--	--	--	11-18	11	2 15/16	12-9
Booth 7	10-14	16	3 10/16	10-28	14	3 8/16	11-11	11	3 2/16	12-2
Sherman	10-14	16		10-28	14		11-11	10		12-2
Vaca	10-14	16	3 9/16	10-28	14	3 7/16	11-11	10	3 0/16	12-2
Marcus	10-14	32								11-25

Column "A" No fruit may be shipped before this date.
Column "D" No restrictions on size or weight after this date.
All weights in ounces, diameters in inches. Where a minimum weight and minimum diameter are given, fruit which meets either standard may be shipped.
The shipping dates and weights for all other varieties listed on last season's schedule remain unchanged, pending further recommendations as the season progresses.

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Schedule for shipment of seedlings, un-named varieties and varieties not listed elsewhere in the regulations (except as noted above).

West Indian Type:
- None to be shipped before June 3
- June 3 to June 17, none smaller than 16 oz.
- June 17 to July 15, none smaller than 14 oz.
- July 15 to Sept. 9, none smaller than 12 oz.
- After Sept. 9, no size restrictions

Guatemalan Type and Guatemalan x W. Indian Hybrids:
- None to be shipped before Sept. 9
- Sept. 9 to Oct. 7, none smaller than 14 oz.
- Oct. 7 to Dec. 23, none smaller than 12 oz.
- After Dec. 23, no size restrictions

Exceptions applicable to seedlings and unlisted varieties: Avocados of the seedling or unlisted variety category which normally change color to any shade of red or purple when fully mature may be shipped, regardless of weight, when any portion of the skin of such fruit has changed to the color it normally has when fully mature. Any seedling or unlisted variety may be shipped without regard to weight, if the exterior of the seedcoat is of a brown color which is characteristic of a mature avocado, as determined by representative sampling prescribed by the Federal-State Inspection Service.

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AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

Bulletin 57/58-8 October 9, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Shipping Schedule for Late Fall and Winter Varieties - Minimum Weight Requirement for Packed Avocado Flats

Your Avocado Administrative Committee met on Tuesday, October 8th, and added the remaining 24 previously recognized varieties of Florida avocados to the list of recommended shipping dates, weights and sizes. The entire schedule of picking dates for the 1957/58 season has been consolidated in tabular form for your convenience and a copy is enclosed with this bulletin. This picking schedule (form AAC-417, printed on pink paper) supersedes all previous schedules issued by the Committee.

The Avocado Administrative Committee took action at its latest meeting to petition the Federal Inspection Service to modify its inspection requirements by eliminating the controversial lot identification stamp. An attempt will be made to work out with the Inspection Service some alternative means of identification of inspected packages which will satisfy the need for safeguards without the added cost of stamping, the unnecessary restriction of packers' operations or the stigma implied by the present stamping procedure.

Considerable concern was shown at Tuesday's meeting over the wide variation in net weight of avocados packed in standard containers under existing standard pack specifications. As a result of this failure to achieve standardization, the Inspection Service has been requested to conduct a study of packs and packing procedures in order that an effective standard pack specification might be recommended. In order to effectuate some immediate corrective action, a minimum of 13 1/2 pounds net weight of avocados per flat has been recommended to the Secretary of Agriculture as an amendment to existing container regulations. Regulations containing this minimum weight limitation are expected to become effective on October 14, 1957.

The recap of effective rules and regulations issued pursuant to the Order regulating the handling of avocados grown in South Florida has been amended as of October 9, 1957, to reflect the amended container regulations and to make reference to the latest picking schedule. A copy of the recap is enclosed with this bulletin.

The Committee will consider proposed amendments to Procedural Rules pertaining to the registration of handlers at its next regular meeting. The next meeting has been scheduled for 9:30 A. M., November 12, 1957, at the office of the Agricultural Agent of Dade County at Homestead, Florida.

All meetings of the Avocado Administrative Committee are open to the public and all interested persons are urged to attend and to participate in the discussions.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-418

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AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

Bulletin 57/58-8 October 9, 1957

To: All Growers and Handlers of Avocados Produced in South Florida

Subject: Shipping Schedule for Late Fall and Winter Varieties - Minimum Weight Requirement for Packed Avocado Flats

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All meetings of the Avocado Administrative Committee are open to the public and all interested persons are urged to attend and to participate in the discussions.

David M. Biggar, Manager
Avocado Administrative Committee

AAC-418

AVOCADO ADMINISTRATIVE COMMITTEE
1102 North Krome Avenue
Homestead, Florida
Telephone CI 7-0848

RECAP OF EFFECTIVE RULES AND REGULATIONS ISSUED PURSUANT TO THE ORDER REGULATING THE HANDLING OF AVOCADOS GROWN IN SOUTH FLORIDA

I. Maturity Regulations--separate schedules of maturity dates, weights and sizes have been prepared and distributed. Form AAC-361 (Bulletin 57/58-2) shows the seedling regulations. Form AAC-372 (Bulletin 57/58-3) describes maturity restrictions applicable to the summer varieties. As additional varieties are included, these schedules will be combined in a more convenient tabular form.

II. Grade Regulations--avocados must meet the requirements of the Avocado Administrative Committee Grades Standards for the Number 2 Grade, as specified in the amended Avocado Administrative Committee Rules and Regulations. In addition, containers must be at least fairly tightly packed and otherwise conform to the standard pack requirements specified in the Grade Standards.

III. Container regulations--avocados may be packed in any of the following containers:
- A. Fiberboard or wooden containers with inside dimensions of 11" x 16 3/4" x 10": Provided, That individual avocados in such containers shall weigh at least 20 ounces or measure 3 7/8 inches in diameter. A tolerance of 10%, by count, for any lot (and not more than 20% for any individual container) shall be allowed for avocados which weigh 18 ounces to 20 ounces and fail to measure 3 7/8 inches in diameter (subject to the size restrictions of the standard pack specifications).
- B. Fiberboard containers with inside dimensions of 13 1/2" x 16 1/2" x 3 1/4."
- C. Fiberboard or wooden containers with inside dimensions of 13 1/2" x 16 1/2" x 3 3/4."
- D. Fiberboard or wooden containers with inside dimensions of 13 1/2" x 16 1/2" x 4 1/2."

IV. Rules
- A. Handlers desiring to handle avocados under this Order must:
  1. Be licensed by the State of Florida as a dealer in agricultural products, and
  2. Register with the Avocado Administrative Committee as a handler of avocados.
- B. Shipments of not to exceed one bushel per day per customer are exempt from regulations, Provided, That such shipments shall not exceed 10 bushels per week per handler.
- C. Growers residing outside of the production area may participate in the election of Committeemen by assigning proxy rights, Provided, That they file, on or before the 20th of January immediately preceding the election, a written statement of intent to be represented by a particular agent at the nomination meeting.
- D. Handlers must report weekly:
  1. The disposition of all non-certified avocados handled through their facilities.
  2. The source of all non-certified avocados received from outside of the district in which registered, and
  3. The quantities of each variety of avocados received at their packing facilities.

MATERIAL UN
SUITABLE FOR
MICROCARDS
PAGES 389 TO 437

Plaintiffs' Exhibit 16

OIL TESTS FOR 1953

July 6, 1953

Pollock R 1 T 3

all refractive indices at 30°C.

R.I. of oil = 1.6325, 1.6327

Wt.		Date	R. I.		% Oil		
666g.	1	7-6	1.6290		2.7%	7-6	
652g.	2	7-6	1.6290		2.7	"	
547g	3	7-6	1.6285		2.5	"	
611	4	7-6	1.6290		2.2	"	
594	5	7-86	1.6284		2.6	7-8	
454	6	7-86	1.6288		2.3	"	
538	7	7-86	1.6280		2.8	"	
546	8	7-86	1.6283		2.6	"	
529	9	7-86	1.6277		2.9	"	
512	10	7-86	1.6278		2.9	"	
818	11	7-6	1.6281		2.7	7-6	
357	12	7-6	1.6290		2.2	"	
301	13	7-6	1.6294		2.0	"	
320	14	7-6	1.6290		2.2	"	
890	15	7-6	1.6290		2.2	"	
315	16	7-6	1.6288		2.9	"	
355	17	7-6	1.6290		2.2	"	
352	18	7-6	1.6290		2.2	"	
265	19	7-86	1.6291		2.2	7-8	
407	20	7-86	1.6292		2.1	"	
296	21	7-8	1.6259		4.0%	7-8	2 inches standing
137	22	7-8	1.6275		3.0	"	
252	23	7-8	1.6249		4.6	"	
204	24	7-8	1.6259		4.0	"	
273	25	7-8	1.6255		4.2	"	
255	26	7-8	1.6261		3.8	"	
262	27	7-8	1.6255		4.2	"	
144	28	7-8	1.6269		3.4	"	
240	29	7-8	1.6262		3.8	"	
206	30	7-8	1.6259		4.0	"	

average % = 2.5
av. wt. = 576

average % = 2.3
av. wt. 338

average % = 3.9
av. wt. = 232

R.d oil 1.6325-1.6328

July 13, 1953

Pollock

R.I. at 30° C

Wt.		Date	Rd.	% oil		
617g	1	7-13	1.6293	2.1%	7-13	
611	2		1.6292	2.1	"	
608	3		1.6284	2.6	"	
675	4		1.6291	2.2	"	
606	5		1.6284	2.6	"	
651	6		1.6298	1.8	"	
565	7		1.6291	2.2	"	
580	8		1.6287	2.4	"	
575	9		1.6278	2.9	"	
581	10		1.6288	2.3	"	
354	11		1.6295	2.0	"	
301	12		1.6299	1.8	"	
376	13		1.6283	2.6	"	
284	14		1.6288	2.3	"	
383	15		1.6294	2.0	"	
405	16		1.6295	2.0	"	
287	17		1.6293	2.1	"	
226	18		1.6301	1.6	"	
377	19		1.6291	2.2	"	
229	20		1.6306		"	

average % = 2.3
av. wt. = 607

average % = 2.1
av. wt. = 322

2 inches standing

371	1	7-15	1.6258	%	7-15	
337	2		1.6253	4.3	"	
444	3		1.6259	4.0	"	
432	4		1.6251	4.4	"	
351	5		1.6258	4.0	"	
398	6		1.6259	4.0	"	
358	7		1.6251	4.4	"	
352	8		1.6264	3.6	"	
324	9		1.6260	3.9	"	
396	10		1.6243	4.9	"	
218	11		1.6270	3.3	"	
199	12		1.6255	4.2	"	
171	13		1.6278	3.3	"	

average % = 4.2
av. wt. = 374

	Weight		Date	Rcd.	% oil			Weight		Date	Rcd	% oil		
Waldin (Kendall)	3625	1	9-1	1.6245	4.9		Booth 8 (Kendall)	2839	1	9-8	1.6251	4.4	9-8	Iula Kendall
	2229	2		1.6265	3.6			2973	2	3.7	1.6270	3.3		
Iula (Kendall)	3351	1.		1.6260	3.9		Booth 8 (Brooks)	4129	1	5.8	1.6243.	4.9		Iula Brooks
	2736	2.		1.6267	3.5			3411	2	5.8	1.6246	4.7		
Booth 8 Blk 5 R20T1	3405	1.		1.6238	5.3	9-2	Iula (Flag)	4450	1		1.6260	3.9		Waldin Kendall
	2972	2.	1.6	~~1.6260~~ 1.6251	4.1									
Iula Blk 5 R16T1	3624	1.		1.6262	3.8		Booth 8 (Flag)	4723	1		1.6243	4.9		Waldin Brooks
	2552	2.		1.6276	3.0									
Iula Blk 9 R5 T3	4964	1		1.6263	3.7		Waldin (Kendall)	~~3077~~ 2273						
	3451	2.		1.6275	3.0			~~3073~~ 3078	2.		1.6258	4.0		Booth 8
											1.6247	4.7		Flag
Booth 8 Blk 5 R21T1	5063	1		1.6262	3.8		Waldin (Brooks)	3017	1		1.6250	4.5	9-9	Booth 8 Kendall
	4309	2.		1.6261	3.8			1975	2		1.6270	3.3		
Iula Blk. 9 R2T3	3144	1.		1.6241	5.1		(Heavatty) Iula	3792	1	5.7	1.6229	5.8		Iula Flag
	3081	2		1.6242	5.0			3067	2	5.3	1.6244	4.9		
Booth 8 Blk 5 R21T1	3280	1.		1.6252	4.4		(Heavatty) Booth 8	3739	1		1.6249	4.6		Booth 8 Brooks
	2255	2.		1.6270	3.3			2311	2		1.6259	4.0		
Iula Blk 9 R5T6	4146	1.	5.6	~~1.6254~~ 1.6241	5.1		Iula (Brooks)	4156	1		1.6255	4.2		Iula Heavatty ?
	3211	2.	4.5	1.6256	4.1									
Iula Blk 5 R16T1	~~440~~ 414	1.	9.4	1.6210	6.9	9-4	Iula Blk 9 R5T6	501	1	7-9	1.6224	6.1	9-9	Iula R2 T3 Blk
	414	2.		1.6216	6.6			495	2		1.6248	4.6		
	490	3.		1.6221	6.3			438	3		1.6245	4.8		
Booth 8 Blk 5 R20T1	573	4.	ave. wt.	1.6195	7.9			481	4	5.2	1.6209	7.0		
	480	5	485	1.6235	5.4		ave % = 6.4	455	5		1.6234	6.5		
	537	6		1.6239	5.2		6.6	456	6		1.6240	5.1		
Iula Kendall	572	7		1.6222	6.2			516	7		1.6241	4.7		
	226	8		1.6214	6.1			518	8		1.6210	6.9		
	450	9		1.6218	6.4			502	9		1.6231	5.7		
	~~556~~ 413	10		1.6224	6.1			535	10		1.6228	5.8		
					6.37			4997				5.62		

% Moisture	Nov.
82.617	Hayes Ch's
81.118	
79.500	
83.666	
81.256	
81.500	
79.960	
82.000	
79.660	
82.400	
	Nov. 26
79.881	Board & Ch's
78.961	
79.241	
80.179	
77.884	
81.318	
81.318	
82.734	
82.135	
79.900	
	Nov. 28
75.449	Lula, Ch 9, R5T3
75.249	
76.992	
78.664	
76.123	
78.023	
75.359	
77.622	
77.400	
77.900	

(33)

Sleight	Date	R. #	% Ash	% Moisture	Nov 28
502	1	1.6218	6.0	81.318	Lula Ch 5
522	2	1.6207	7.1	81.087	R 6 T 2
641	3	1.6196	7.8	79.461	
508	4	1.6231	5.7	80.039	
448	5	1.6238	5.0	80.339	
493	6	1.6226	6.0	79.341	
512	7	1.6209	7.1	79.780	Nov 30
421	8	1.6220	6.3	80.677	
483	9	1.6224	6.1	78.366	
404	0	1.6220	6.3	82.575	
					Lula Ch 5
4934	11-30	1.6220	6.3		R 14 T 16
5071	11-31	1.6182	8.8		Lula Light
5105	11-30	1.6180	8.9		Lula, Aladay
5805	11-30	1.6161	10.2		Lula, Chm, Ch 7
4826	11-30	1.6172	9.4		Lula Rhoney
684	1 11-30	1.6189	8.3	75.324	Board 7 Ch 9
676	2	1.6151	10.9	74.825	R 7 T 3 December
547	3	1.6167	9.8	76.370	
584	4	1.6161	10.2	76.666	
616	5	1.6165	9.9	75.772	
663	6	1.6158	10.4	77.345	
643	7	1.6171	9.5	78.364	
617	8	1.6164	10.0	77.667	
539	9	1.6175	9.2	75.748	
484	10	1.6186	8.5	75.573	
					Lula 2
4818	1	12-19 2 1.6169	9.6		Lula, Hay
3508	2	9.6 1.6172	9.4		

(34)

Sleight	Date	R. #	% Ash	% Moisture	December 2
5615	1	12 1.6198	9.7		Lula, Brooks
4719	2	6 1.62	8.8		
5791	2	7.2 1.6193	8.0		Lula Rundall
4533	2	6.9 1.6206	7.2		
3458	2	1.6154	11.7		Booth, Rhoney
					December 2
5705	2	1.6199	7.6		Hall, Rhoney
5615	3	1.6193	8.0		Lula, Brooks
6029	1	1.6188	8.6		Booth, Rundall
4857	2	1.6181	8.8		
3845		1.6170	9.6		Taylor, Brooks
3853		1.6181	8.8		Taylor, Rhoney
5678		1.6156	10.5		Booth 3 Rhoney
5384		1.6188	8.4		Booth 3 Hay
4462	1	1.6189	8.3		Booth 8, Brooks
3295	2	1.6178	9.3		
					December 4
					Hickson, Rhoney
4559		1.6163	10.0		
4718		1.6186	8.5		Booth, Rhoney
4544		1.6170	9.6		Hickson, Rundall

(35)

Weight		Date	R.J.	% Oil	% Moisture	December 7
604	1	12-7	1.6218	6.6		Lula, Cl. 8
666	2	"	1.6206	7.2		R17 T24
463	3	"	1.6050	4.5	76.294	
607	4	"	1.6222	6.1		
646	5	"	1.6188	8.4		
640	6	"	1.6227	5.9	78.152	Dec. 8
707	7	"	1.6195	9.9		
639	8	"	1.6235	5.9	78.742	
636	9	"	1.6199	7.6		
571	10	"	1.6205	7.2		
463	38	12-7	1.6246	4.9		
640	68	12-7	1.6226	6.0		
639	98	12-7	1.6235	6.4		
557	28	12-4	1.6163	10.7		Lula, Cl. 9 R3 T3
495	58	12-4	1.6187	8.6		Lula, Cl. 9 R3 T3
4450 (6 funk)		12-1	1.6163	10.0		Hall, Hay
5442	1	12-8	7 / 1.6196	7.8		Lula, Brooks
4325	2	"	6.9 / 1.6208	7.1		
						December 9
3866	1	12-8	7.3 / 1.6194	5.0		Lula, Kendall
4564	2	"	/ 1.6207	7.1		
3319 (4 funk)		12-8	1.6198	7.7		Choquette, Andrews
5789		12-8	1.6211	6.9		Hall, Cheney
3974		12-8	1.6163	10.0		Taylor, Brooks
4208		12-8	1.6169	9.6		Taylor, Cheney

(38)

Weight		Date	R.J.	% Oil	% Moisture	December 10
408	1	12-10	1.6182	8.8	76.669	Bond 7, Cl. 6
459	2	"	1.6219	6.4	79.860	R15 T1
471	3	"	1.6204	7.3	77.300	
582	4	"	1.6211	6.9	79.800	
514	5	"	1.6202	7.4	78.784	
559	6	"	1.6184	8.6	78.386	
552	7	"	1.6201	7.5	78.428	
492	8	"	1.6200	7.6	77.032	
440	9	"	1.6208	7.1	80.239	
478	10	"	1.6219	6.4	79.960	Dec 11
578	1	12-11	1.6198	7.9	76.257	December 11
669	2		1.6188	11.0	76.000	Bond 7 Cl. 9
525	3		1.6147	11.2	75.398	R4 T1
737	4		1.6158	10.4	76.047	
640	5		1.6164	11.4	74.775	
648	6		1.6195	7.9	76.200	
638	7	12-11	1.6135	12.0	73.900	Dec 14
630	8		1.6166	9.8	75.473	
585	9		1.6152	10.8	74.576	
567	10		1.6177	9.1 / 9.1	77.600	
						Dec. 14
611	1	12-14	1.6218	6.5	82.185	Lula, Cl. 9
511	2	"	1.6182	8.8	75.524	R3 T3
463	3	"	1.6164	10.0	75.700	
592	4	"	1.6163	10.0	75.948	Dec 15
586	5	"	1.6162	10.1	75.948	
632	6	"	1.6141	11.6	73.080	
622	7	"	1.6173	9.4	72.624	
352	8	"	1.6196	7.8	77.367	
489	9	"	1.6173	9.4	70.529	
391	10	"	1.6209	7.0	78.660	
5423	1	12-15	9.7 / 1.6158	10.6		Lula, Brooks
4520	2		9.2 / 1.6173	9.4		Dec. 16

(39)

[fol. 372]

13	7.8	Lula, Kendall					
10	6.7	Lula, Kendall	2700	(6)	12-7	Holoma = 1.6322 72 & Chlamydobolus = 1.6198 & 6.8	Board 3 Kendall 2
1	4.2	Lula, Kendall	2989	(6)	12-7	1.6178 a 7.2	Lula, Kendall 2
10	8.6	Lula, Kendall	2900	(6)	12-7	1.6175 a 7.4	Board 1, Kendall 2
4	7.1	F.E.C. Stop Lula, Cox 2	2215	(6)	12-7	1.6153 a 8.5	Lula, Kendall 8
7	10.2	December 6 Board 1, F.E.C. Stop	3200	(6)	12-7	1.6170 a 7.7	Lula, Kendall 9
8	8.8	Lula, F.E.C. Stop	2535	(6)	12-7	1.6169 a 7.8	Lula, Kendall 10
12	8.5	Board 1, F.E.C. Stop	2977	(6)	12-10	Holoma = 1.6339 1.6175 10.6	December 10 Lula, Lee
05	5.3	Lula, Flag	3020	(6)	12-10	1.6182 9.6	Board 1, Board (Cox)
58	11.5	Vaca, Krome	2041	(6)	12-10	1.6158 11.3	Board 1, Buchanan
12	11.2	Lula, Kendall	2633	(6)	12-10	1.6188 9.2	Taylor, Ames
16	7.6	Lula, Kendall	2334	(6)	12-10	1.6209 7.8	Taylor, Higgins, Truax
242	6.0	Board 6, Kendall	2721	(6)	12-10	1.6211 7.7	Lula, Higgins, Bruce
98	8.8	Board 3, Kendall	2477	(6)	12-10	1.6214 7.5	Herman, Cotton
84	9.7	Board 1, Kendall December 7	1904	(6)	12-10	1.6219 7.2	December 11 Lula, Herman
15	7.6	Lula, Kendall	2133	(6)	12-10	1.6211 7.7	Lula, Cotton
30	6.7	Lula, Kendall	2168	(6)	12-10	1.6208 7.9	Lula, Lamp
94	9.0	Taylor, Kendall	2447	(6)	12-11	1.6204 8.2	Lula, Labelle (Bruce)
212	7.8	Nicholson, Kendall	2257	(6)	2-11	1.6207 8.0	Lula, Harlan, Lee
			2428	(6)	2-11	1.6218 7.2	Lula, Harlan, Lee

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					December 12, 1906
2994	(6)	12-12	[illegible] 1.6339 1.6190	9.1	Lula, Flint
3177	(6)	12-12	1.6186	9.3	Booth, Flint
2526	(6)	12-11	1.6222	7.0	Booth, Booth
2122	(6)	12-12	1.6225	6.8	Hickson Kalyx [illegible]
3296	(7)	12-12	1.6161	11.1	Booth, Navarre
3868	(7)	12-11	1.6201	8.4	Lula, Com #1
3303	(7)	12-11	1.6190	9.1	Lula Com #2
1079	(3)	12-12	1.6199	8.5	Lula Rosa S.T. Lucy December 14
4086	(6)	12-13	1.6182	9.6	Booth 10, Kendall
3436	(6)	12-13	1.6173	10.2	Booth 3, Kendall
3363	(6)	12-14	1.6201	8.4	Collinson, Kendall
3478	(6)	12-14	1.6159	11.2	Booth 3, C. Lee
2963	(6)	12-14	1.6205	8.1	Herman, Kendall
3182	(6)	12-14	1.6213	7.6	Collinson, PH Kendall
3091	(6)	12-17	cellulose acetate - 1.6296 1.6183	6.8	December 17 Lula, Camp
3091	(6)	12-17	new halowax - 1.6343 1.6233	6.6	December 18 Lula, Camp
1973	(4)	12-20	1.6175	10.4	December 20 Pope, Pope
~~1973~~	(4)	12-20	1.6131	13.6%	December 27 Pope, Pope
2282	(6)	12-27	1.6232	6.7	Lula, [illegible]
2016	(6)	12-27	1.6214	7.8	Hayley, Hankins 37982

[fol. 389]

PLAINTIFFS' EXHIBIT 17

SOUTH FLORIDA GROWERS ASSOCIATION, INC.

AVOCADO SHIPMENTS BARRED FROM SALE IN CALIFORNIA

November 10, 1954, shipped 449 boxes* (134/24s, 42/27s, 147/30s, 126/36s) and 359 flats (229/9s, 130/10s) of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 118 boxes (42/36s, 76/30s) were rejected upon test of oil content; reshipped to Phoenix, Arizona. Sales in Los Angeles averaged $4.43 per box whereas sales in Phoenix were only $4.17 per box; added transportation and handling costs brought loss on shipment to $59.85.

November 11, 1954, shipped 650 boxes Booth 7 avocados, 539/30s and 111/36s, on consignment to Calavo, Inc., Los Angeles, California. On arrival at Los Angeles, 428/30s and 111/36s were rejected upon test of oil content. These were reshipped to Calavo, Inc., at Phoenix, Arizona and sold at average of $3.92 per box as compared with sales in Los Angeles at $4.50 per box; added transportation and handling costs amounted to $158.14; total loss $394.20.

November 12, 1954, shipped 650 boxes (575/30s, 75/36s) of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 97 boxes (30 size) were rejected upon test of oil content; reshipped to Phoenix, Arizona. Sales in Los Angeles averaged $4.43 per box, whereas sales in Phoenix averaged $3.90 per box; added transportation and handling costs brought loss on shipment to $75.39.

[fol. 390] November 18, 1954, shipped 650 boxes of Lula avocados to Calavo, Inc., Los Angeles, California. Upon arrival at Los Angeles, 72 boxes were rejected upon test of oil content; reshipped to Phoenix, Arizona; added transportation and storage costs resulted in loss on shipment amounting to $24.89.

* Boxes, 40 lbs; flats (or lugs), 15 lbs.

November 16, 1955, shipped 677 boxes (140/30s, 395/36s, 142/41s) of Lula avocados to Lucky Stores at San Leandro, California, on order of Calavo, Inc., San Francisco. These were originally sold at $5.00 per box delivered. Upon arrival at San Leandro, the 39-size and 41-size boxes, amounting to 282 boxes, were rejected upon test of oil content; reshipped to Calavo, Inc., Portland, Oregon; sold there at lower price, and added transportation and storage costs resulted in loss of $210.62 on this shipment.

November 29, 1956, shipped 1,550 flats of Lula avocados (65/12s, 158/14s, 721/16s, 656/18s) to Calavo Growers of California, Los Angeles, California, on consignment. Upon arrival at Los Angeles, the 721 flats of 16-size avocados were rejected upon test of oil content; reshipped to Calavo Growers of California at Phoenix, Arizona. The average selling price in Los Angeles was $3.00 per flat, whereas the fruit sold in Phoenix averaged $2.08 per flat; added transportation and handling costs resulted in loss of $821.62 on this shipment.

[fol. 391] November 14, 1957, shipped 1,795 flats of Lula avocados (62/10s, 1051/12s, 492/14s, 190/16s) to Lucky Stores at San Leandro, California, on order of Calavo Growers of California, San Francisco. Upon arrival at San Leandro, the 492/14s were rejected upon test of oil content; reshipped to Calavo Growers of California at Salt Lake City, Utah, where they were sold at $1.00 per flat. Since these avocados were originally sold at $1.89 per flat at San Leandro, a loss of $.89 per flat resulted in addition to added transportation and handling costs of $202.02, making a total loss on the shipment of $639.90.

PLAINTIFFS' EXHIBIT 18

SOUTH FLORIDA GROWERS ASSOCIATION, INC.

Avocados handled in calendar years
1954, 1955, 1956, 1957

	Total Volume in bushels **	Sales in Florida	Sales in California	Sales in Other States
1956	144,048	9272	15,055	119,721
1957	181,628	6762	2,443	172,423
Total 1956-1957	325,676	16034	17,498	292,144
% of Total	100%	4.93%	5.37%	89.70%

1954 - Total Volume 166,818

1955 - Total Volume 206,308

Distribution of sales not available

** Bushel - 55 lbs.

PLAINTIFFS' EXHIBIT 19

SOUTH FLORIDA GROWERS ASSOCIATION, INC.

Avocados handled in calendar years 1954, 1955, 1956, 1957

(In bushels, at 55 pounds per bushel)

Total volume	Sales in Florida	Sales in California	Sales in other states
1954 166,818	--	5,734	161,084
1955 206,308	--	11,673	194,635
1956 144,048	9,272	15,055	119,721
1957 181,628	6,762	2,443	172,423

PLAINTIFF'S EXHIBIT 20

FLORIDA LIME AND AVOCADO GROWERS, INC.

AVOCADOS HANDLED IN SEASONS

1955-56; 1956-57; 1957-58*

Total Volume in Bushels**	Sales in Florida	Sales in California	Sales in Other States
1955-56 : 59,543	418	10,806	46,319
1956-57 : 30,191	210	3,415	26,566
1957-58 : 34,099	156	2,538	31,405
(To Jan.10,1 958)			
TOTAL 123,833	784	16,759	106,290
% of Total - 100%	.0063%	13.53%	85.84%

* Season about August 1 to February 15
** Bushel - 55 lbs.

1954-55 season: total volume handled- 47,954 bushels
Sales in California - 12,641 "

Other distribution figures not available.

[fol. 395]

PLAINTIFFS' EXHIBIT 21

FLORIDA LIME AND AVOCADO GROWERS, INC.—
AVOCADO SHIPMENTS BARRED FROM
SALE IN CALIFORNIA

November 10, 1955, shipped 1129 lugs of Lula avocados, 12 per lug (12's), on sale to Safeway Stores, Oakland, California (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $2,088.65; entire load rejected in California upon test of oil content and reshipped to E. O. Muir, Salt Lake City, Utah; proceeds of sale in Salt Lake City, net after added transportation and handling costs, $711.60; loss $1,377.05.

November 12, 1955, shipped 800 lugs of Lula avocados, 12 per lug (12's) on sale to Safeway Stores at Sacramento, California, and 1283 lugs Lula avocados (12's) to Safeway Stores at Oakland, California, (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $3,853.55; entire load rejected in California upon test of oil content and reshipped to United Brokers, Inc., Portland, Oregon; proceeds of sale in Portland, net after added transportation and handling costs, $1,683.01; loss $2,170.54.

November 14, 1955, shipped 2208 lugs of Lula avocados, 12 per lug (12's), on sale to Safeway Stores, Oakland, California, (through buying office at Lakeland, Florida) @ $1.85 per lug delivered, total $4,084.80; entire load rejected in California upon test of oil content and reshipped to Pacific Fruit and Produce Company, Medford, Oregon, and Seattle, Washington; proceeds of sale in Medford and Seattle, net after added transportation and handling costs, $1,788.20; loss $2,296.60.

[fol. 396] December 8, 1955, shipped 700 lugs of Lula avocados and 200 bruce boxes of Lula avocados (40 pounds net weight), on sale to Mendelson-Zeller Company, Los Angeles, California, @ $2 per lug, and @ $4 per bruce, total $2,200; entire load rejected in California upon test of oil content and reshipped to Crombie & Company, El Paso,

Texas; proceeds of sale in El Paso, net after added transportation and handling costs, $548.18; loss $1,651.82.

November 15, 1957, shipped 1874 lugs of Lula avocados to California, 900 lugs on consignment to Williams and Son Produce Company, Los Angeles, and 974 lugs on consignment to Felix Cohen & Son, Oakland; 361 of the lugs unloaded at Los Angeles, rejected upon test of oil content (sizes 16's and 18's); reshipped to Phoenix, Arizona, and added transportation and handling expenses included in price paid by buyer.

LOS ANGELES COUNTY
AGRICULTURAL COMMISSIONER
STANDARDIZATION DIVISION
307 WHOLESALE TERMINAL BUILDING
LOS ANGELES, CALIFORNIA TELEPHONE VA 4577

No 59762

STANDARDIZATION VIOLATION—HOLD REPORT

NOTICE: (1) The below described lot, including the containers thereof, is a public nuisance. Until reconditioned or otherwise brought into compliance the transportation or sale of such lot is illegal. (2) If the lot is held and a "Hold Tag" has been affixed to the lot, as indicated above, it is unlawful to remove the lot from its present location except under the specific direction of an authorized enforcing officer. Unless such lot held by the enforcing officer is reconditioned or otherwise brought into compliance by not later than_____o'clock (a.m.) (p.m.) _____ 195... or written consent to destroy or otherwise dispose of said lot shall have been given to the enforcing officer by the persons served with notice of noncompliance, the commodity or commodities are subject to the order of any court of competent jurisdiction to destroy such lot or otherwise abate the nuisance.

DATE Wed 19__ TIME 6:30 A.M. INSPECTOR

AMOUNT 3 Cartons KIND Avocados

IDENTIFYING MARKS 16 5/18 2E Flora Brand Lots

FOUND IN POSSESSION OF Williams & Sons

AT (ADDRESS) 714 Hewitt Pl. T.A.

CAR OR TRUCK NO._____ RETAIL MKT. WHOLESALE MKT. RANCH PKG. HOUSE

CONSIGNOR Rondalino Aguado

ADDRESS Princeton Florida Grower Inc

DELIVERED BY_____

ADDRESS_____

UNLAWFUL ACT Possession

SECTION NO. 784.

NON-CONFORMITY OF COMMODITY Immaturity, Excess of 10% Soft Avocados

SECTION NO. 78 e

LOT NEW (__) HOLD ON Not held → Hold Tag - 9.8, 9.0, 10.95, 8.8, 12.9

REMARKS

701-18 51 2E - 7.4, 9.95, 7.35, 7.75, 9.0

791 - No. 1 = 9.1, 7.8, 7.35, 9.4, 9.1

Tests added by Mr. Smith.

[fol. 397]

PLAINTIFF'S

DATE 11/29 19__ TIME 9:45 11 AM room INSPECTOR

AMOUNT 3 Cartons KIND Avocados

IDENTIFYING MARKS 16 Sizes 32 Flats Brand Lulu

FOUND IN POSSESSION OF Williams & Sons

AT (ADDRESS) 214 Hewitt Ave. T 69

CAR OR TRUCK NO. _____ RETAIL DKT. WHOLESALE DKT. RANCH PKG. HOUSE

CONSIGNOR Houdaline & Avocado Growers Inc

ADDRESS Princeton Florida

DELIVERED BY _____

ADDRESS _____

UNLAWFUL ACT Possession

SECTION NO. 784.

NON-CONFORMITY OF COMMODITY Immaturity, Excess of Minimum Avocados

SECTION NO. 784

LOT NEW (__) HOLD OVER (__) not held → Mat'g - 9.6, 9.0, 10.9, 8.8, 12.9

REMARKS

791-1851 lb = 7.4, 9.9, 7.3, 7.5, 9.0

791-1851 lb = 9.1, 7.8, 7.3, 9.6, 9.1

Tests added by Schmidt

Dept. Agric. Insp.

VIOLATION NOTICE (✓) HOLD NOTICE (__) ISSUED 11/30/67

LOT TO BE IN COMPLIANCE BY _____ O'CLOCK _____

I HEREBY AGREE TO _____

to comply with the provisions of the California Agricultural Code.

SIGNATURE [signature]

76 S 631 12-56 3440

No. 59762

Confidential - Not to be quoted or copied.

General Information on Avocado Research - 1953-54

Paul L. Harding
Agricultural Marketing Service
U. S. Department of Agriculture
Orlando, Florida

Growers

A Kendall
B Brooks
C Rheney
D F.L.A.G.
F White
G Futch
H Hickson
I Harkness
J Subtropical Experiment Station

Samples - About 40 fruits - 20 tested for oil - Homestead
20 tested for flavor - Orlando

Pressure tests - 5/16 inch plunger on hard fruit
7/16 inch plunger on soft fruit

Softening temperature - Days to soften at 75°F.

Flavor - based on average numerical taste rating of fruit above and below weight class for earliest picking date.

Score card - Flavor based on arbitrary numerical taste score.

Tasters - About 10 staff members:
Harding, Sunday, Nelson, Winston, Meckstroth, Cubbedge, Roberts, Dudak, Welty, McLendon, Smith, Gardner, Melvin

Method of tasting - Lot divided into below and above weight class; fruit cut in half, tasters sampled longitudinal slices.

Varieties and Sampling - 1953-54

Variety	Groves tested	Lots tested	Fruit tested	Sampling period
Pollock	1	1	15	8-7-53
Waldin	5	17	267	8-3 to 10-6-53
Trapp	2	2	18	8-19 to 9-26-53
Pinnelli	1	1	7	9-16-53
Tonnage	1	2	26	8-15-53
Booth 8	3	36	698	8-19 to 12-15-53
Lula	4	47	727	8-19-53 to 1-12-54
Booth 7	2	17	256	9-29 to 12-15-53
Hickson	4	15	236	9-29 to 12-12-53
Collinson	1	2	21	10-27-53
Taylor	2	15	251	10-22-53 to 1-12-54
Hall	3	17	200	9-29 to 12-29-53
Herman	2	3	31	10-13 to 11-11-53
Booth 1	2	8	113	10-22 to 12-15-53
Booth 3	2	14	211	8-25 to 12-29-53
Wagner	1	2	30	12-16-53
Choquette	1	1	3	12-8-53
17	37	200	3110	August 7, 1953 to Jan. 14, 1954

[fol. 399]

SCORE CARD FOR TESTING TASTE OR FLAVOR OF AVOCADOS

Arbitrary Standard	Taste or flavor of fruit	Numerical Rating Range Corresponding to description.	Individual Numerical Rating
Green	Green, grassy, bitter, unpleasant after taste, unpalatable and rubbery to soft texture (Does not meet consumer acceptance)	50 - 59	
Unpalatable	Flat, watery, slightly bitter, slightly unpleasant after taste and rubbery to soft texture (Does not meet consumer acceptance)	60 - 69	
Palatable	Smooth, mellow, watery, satisfactory flavor and firm to soft texture (Meets minimum standard of consumer acceptance)	70 - 79	
Excellent	Smooth, mellow, tasty, rich, nutty with quality of distinct excellence and buttery texture (Excellent)	80 - 100	

Underscore or write in character or characters that determined your rating.

Reprinted from the Proceedings of the
FLORIDA STATE HORTICULTURAL SOCIETY
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Miami Beach, October 20, 21, & 22, 1954

THE RELATION OF MATURITY TO QUALITY IN FLORIDA AVOCADOS[1]

PAUL L. HARDING

Principal Plant Physiologist

Agricultural Marketing Service

U. S. Department of Agriculture

Orlando

In the past there was no legal standard for picking avocados grown in Florida. Many conscientious growers and shippers picked and allowed to soften a few representative fruits. Marketing was based on the outcome of these tentative observations. The purpose of the present investigation was to find an easily applied test whereby palatability of the softened fruit would be correlated with maturity. The changes that occur in Florida avocados during their maturing, ripening, and softening periods were studied to obtain data on which to base a practical standard for determining the quality of the fruit. The results presented indicate that maturity of a variety can be fairly well designated by correlating minimum fruit weights and picking dates.

During the 1953-54 season some 200 different lots of avocados representing 16 commercial varieties were tested at Orlando for minimum maturity requirements. Special attention was given to (a) picking date and (b) fruit weight in accordance with the proposals made by the leaders in the industry.

REVIEW OF LITERATURE

In 1925 California avocado growers succeeded in having established a State maturity standard of 8 percent fat or oil content. Hodgson (2) stated that "this action has been productive of very great benefit to the industry mostly windfalls or stolen fruit from the market."

Wolfe, Toy, and Stahl (5) published results of analyses of fruit of a large number of avocado varieties grown in Florida. They found no correlation between fat content and good quality as far as comparison of varieties is concerned. Their results showed that two of the finest varieties for eating are the Trapp and Pollock, both low in fat. The varieties Collinson and Linda, almost equally esteemed, have twice the fat content of the other two. Wolfe, Toy, and Stahl further stated that some varieties low and some high in this constituent are distinctly mediocre in palatability.

MATERIAL AND METHODS

Most of the avocado fruit used in this study was grown in Dade County, but a few lots were obtained from other parts of Florida.

The samples consisted of 40 or more fruits picked at intervals of 1 and 2 weeks. About 20 fruits of each sample were shipped to Orlando via Railway Express Agency with a transit period of 2 or 3 days. The portions of the samples retained in Homestead were tested for oil content by the refractive index method used in California (3, 4). Seasonal changes in the oil content of avocados will be discussed by Harkness (1).

The period of testing was August to January, and usually various stages of fruit development from immaturity to post-maturity were covered. Immediately on arrival at the Horticultural Field Station at Orlando, Florida, each fruit was numbered, weighed, and stored at 75 degrees F. for softening. Picking date, weight of fruit, number of days required for softening, loss in weight during softening and

[fol. 401]

conscientious growers and shippers picked and allowed to soften a few representative fruits. Marketing was based on the outcome of these tentative observations. The purpose of the present investigation was to find an easily applied test whereby palatability of the softened fruit would be correlated with maturity. The changes that occur in Florida avocados during their maturing, ripening, and softening periods were studied to obtain data on which to base a practical standard for determining the quality of the fruit. The results presented indicate that maturity of a variety can be fairly well designated by correlating minimum fruit weights and picking dates.

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Review of Literature

In 1925 California avocado growers succeeded in having established a State maturity standard of 8 percent fat or oil content. Hodgson (2) stated that "this action has been productive of very great benefit to the industry in that it has helped eliminate immature fruit,

[1] The author commends Mr. Charles H. Steffani, Dade County Agricultural Agent, and acknowledges the importance of his published report on the maturities of avocados and the value of his efforts to the organization of the research program. Acknowledgment is made to Dr. Roy W. Harkness, Assistant Chemist, Sub-Tropical Experiment Station, University of Florida, for his generous cooperation in this project, and to the following growers and shippers for providing fruit used in these investigations: J. R. Brooks, Florida Lime and Avocado Growers, Inc., Ivey E. Futch, Harold E. Kendall, and William E. Rheney. Credit is hereby given the following staff members who assisted in conducting the study: Earl F. Nelson and Milliard B. Sunday.

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The period of testing was August to January, and usually various stages of fruit development from immaturity to post-maturity were covered. Immediately on arrival at the Horticultural Field Station at Orlando, Florida, each fruit was numbered, weighed, and stored at 75 degrees F. for softening. Picking date, weight of fruit, number of days required for softening, loss in weight during softening, and flavor or "taste" also were recorded. All lots were rated by about ten members of the staff on the arbitrary standard scale on the score card reproduced herein.

Results

The varieties Waldin, Booth 8, Lula, Booth 7, Hickson, Taylor, Hall, Booth 1, and Booth 3 are represented adequately in the experimental data, and Trapp, Pinnelli, Tonnage, Collinson, Herman, Wagner, and Choquette are inadequately represented (table 1).

[fol. 401]

450
[fol. 402]

SCORE CARD FOR TESTING TASTE OR FLAVOR OF AVOCADOS

Arbitrary Standard	Taste or flavor of fruit	Numerical rating range corresponding to description	Individual numerical rating
Green	Green, grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture (Does not meet consumer acceptance)	50 - 59	
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Palatable	Smooth, mellow, watery, satisfactory flavor and firm to soft texture (Meets minimum standard of consumer acceptance)	70 - 79	
Excellent	Smooth, mellow, tasty, rich, nutty with quality of distinct excellence and buttery texture (Excellent)	80 - 100	

Underscore or write in character or characters that determined your rating

The general findings (table 1) showed a close relation between quality of fruit and definite picking dates and weight. In the 1953-54 crop year, the proposed standards

taste, and the texture was rubbery to soft (fig. 1).

Palatability was correlated with maturity of fruit on the tree. Avocados, particularly Lula,

Green	Green, grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture (Does not meet consumer acceptance)	50 - 59	
Unpalatable	Flat, watery, slightly bitter, slightly unpleasant after taste and rubbery to soft texture (Does not meet consumer acceptance)	60 - 69	
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Underscore or write in character or characters that determined your rating

The general findings (table 1) showed a close relation between quality of fruit and definite picking dates and weight. In the 1953-54 crop year, the proposed standards would have permitted the shipment of fairly satisfactory fruit. The results indicate no change from the proposed minimum standard for Waldin and Lula. However, weight of fruit should be slightly increased for Booth 7 and slightly decreased for Booth 1 and Booth 3.

Large avocados of any variety were rated higher in flavor than small fruit. In this connection it should, however, be pointed out that quality was not directly associated with large fruit per se. It was frequently demonstrated that large to very large avocados of a late-maturing variety would not ripen satisfactorily when picked too early. The texture was usually soft and rubbery, and the flavor was "green" and "unpalatable." Smaller avocados in a lot often required longer periods to soften at 75 degrees F. than did the larger fruit. The small fruit was frequently unpalatable when soft. The flavor was flat, watery, and slightly bitter. There was a slightly unpleasant after taste, and the texture was rubbery to soft (fig. 1).

Palatability was correlated with maturity of fruit on the tree. Avocados, particularly Lula, Booth 8, Booth 3, Hickson, and Hall, were mediocre in quality when picked at an early stage of maturity. The fruit was good to very good when harvested at a later date. After fruits attained maturity, quality varied among groves. For example, the fruit from Grove A rated higher than that from Grove D (fig. 2). However, it should be pointed out that the stage of maturity of the fruit when harvested is directly related to its palatability and is the most important factor that influences eating quality. Other factors, such as weather conditions, including rainfall and sunshine, soils and fertilizers, likewise may affect eating quality; but it has not been feasible to determine in what way or to what extent.

The rate of softening of fruit at 75 degrees F. was fairly uniform. The time required for fruit to reach eating quality was 3 to 10 days and averaged 5 days. The loss in weight of fruit during the softening period at 75 degrees F. averaged about 5 percent. Decay was not very important during ripening. Total decay

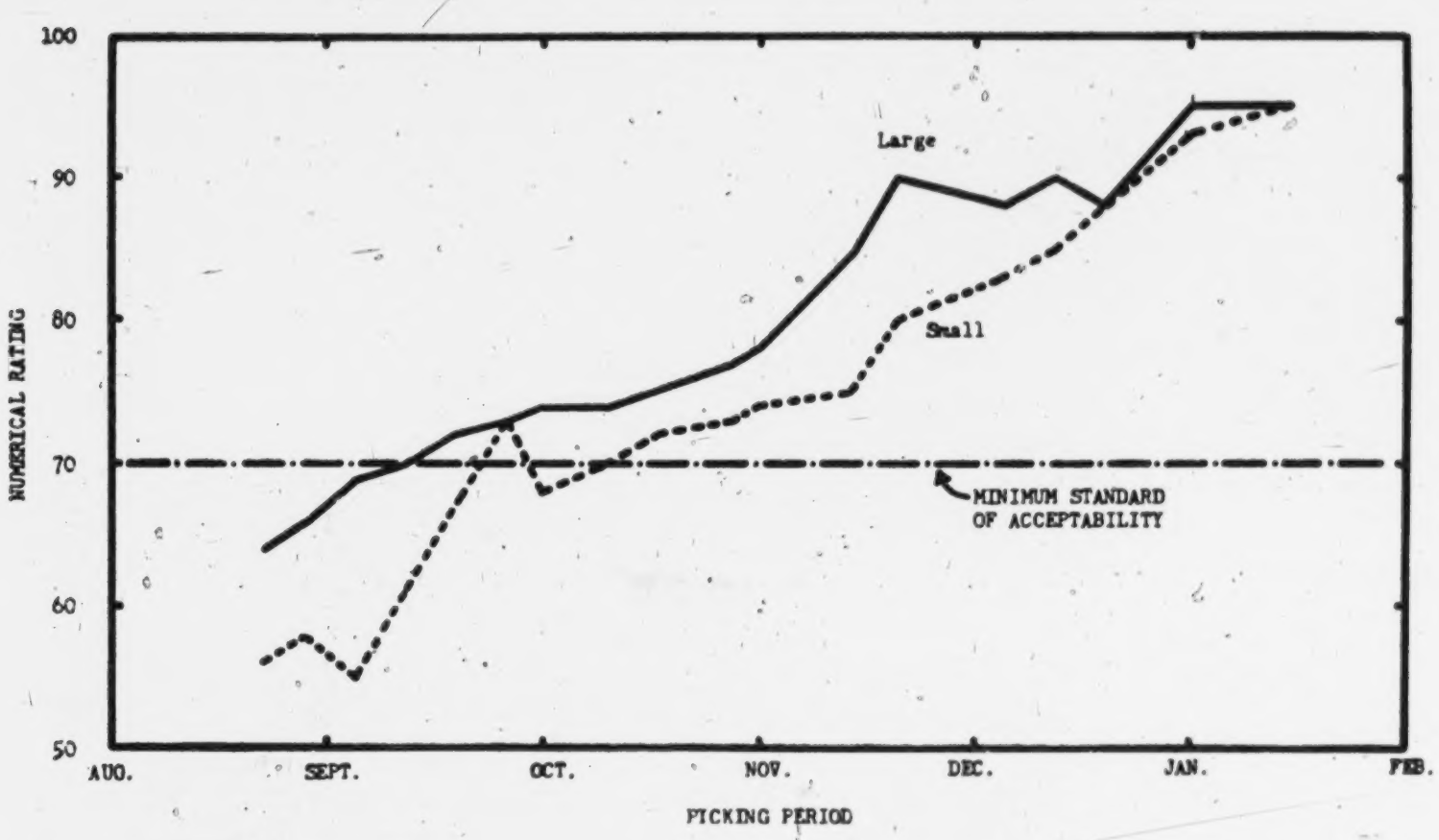
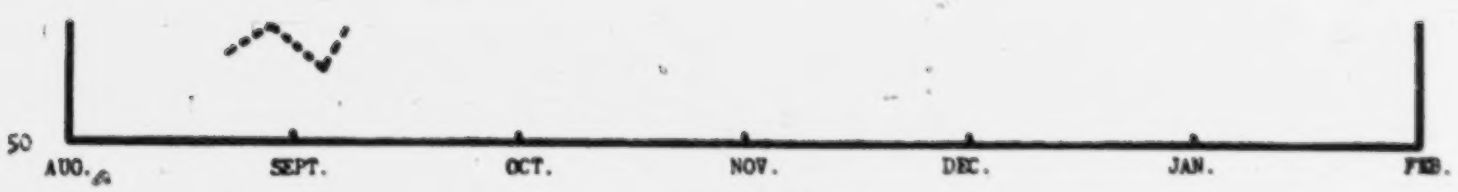


Figure 1.--The palatability of large (average weight 15 ounces) and small (average weight 12 ounces) Lula avocados at different picking periods. Results based on averages of 3 crops of fruit, 1953-54.

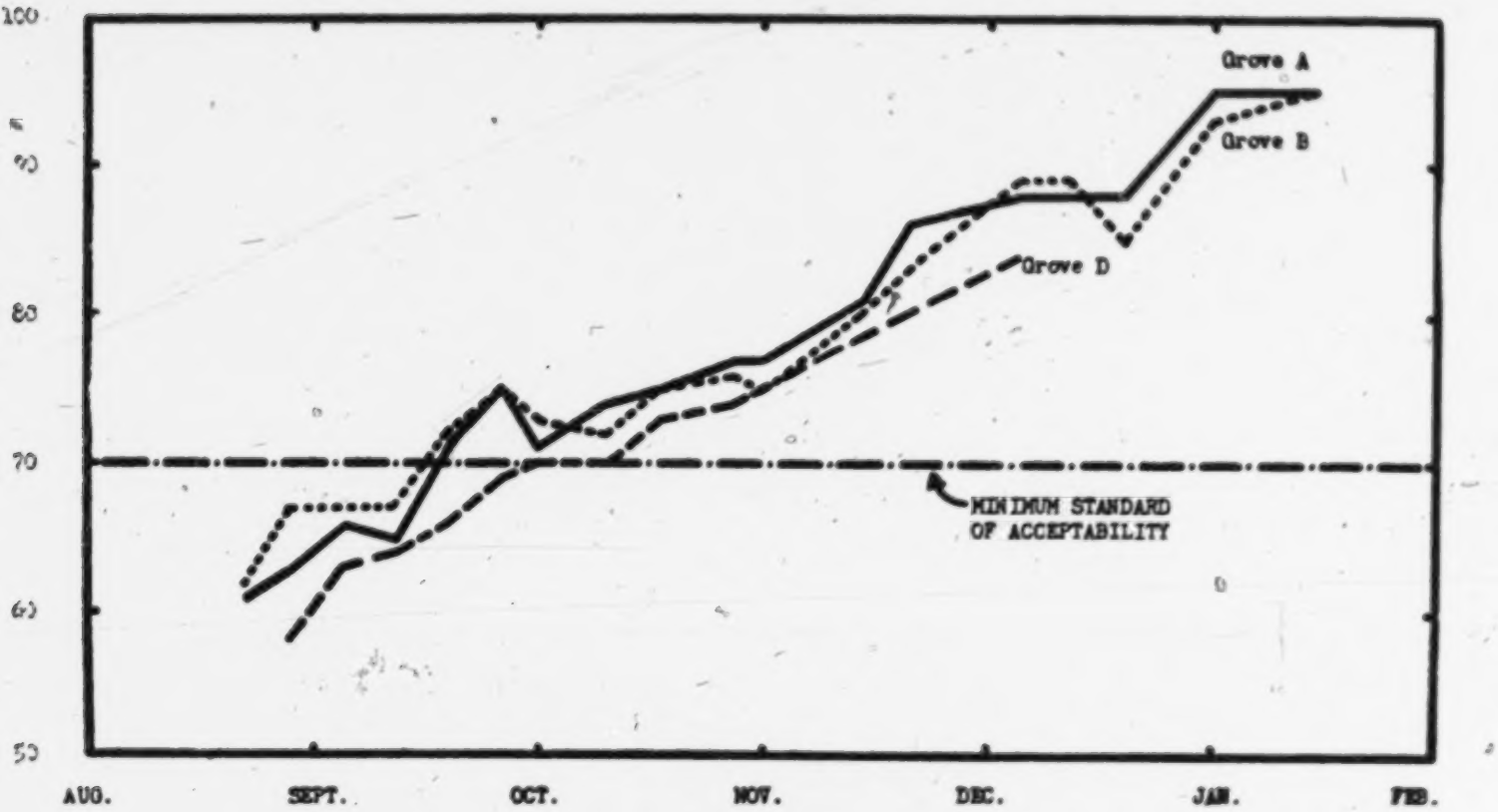


[fol. 403]



PICKING PERIOD

ure 1.--The palatability of large (average weight 18 ounces) and small (average weight 12 ounces) Lula vocados at different picking periods. Results based on averages of 3 crops of fruit, 1953-54.



PICKING PERIOD

igure 2.--Effect of crop or grove variation on the palatability of Lula avocados, 1953-54.

[fol. 403]

Table 1. Maturity of avocados in relation to picking dates and fruit sizes, 1953-54.

Variety	Proposed picking date 1/	Proposed fruit size 1/	Grower	Lots tested	Earliest picking date	Fruit size		Softening period (75° F.) 2/		Loss in weight	Numerical flavor rating
						Minimum	Range	Average	Range		
		Ounces		Number		Ounces	Ounces	Days	Days	Percent	
Waldin	Aug. 7	16	A	6	Aug. 12	15	9-18	6	4-10	5.3	72
			B	7	Aug. 12	14	7-17	7	6-10	8.2	72
			C	2	Aug. 12	15	11-16	6	4-11	6.9	72
			J	1	Aug. 5	14	6-15	6	5-7	.5	70
			D	1	Aug. 19	16	14-17	5	3-7	4.7	75
Trapp	Aug. 15	14	D	1	Aug. 19	14	13-16	6	3-7	6.5	72
			F	1	Aug. 16	14	10-15	4	3-6	7.7	70
Pinnelli	Aug. 15	14	F	1	Sept. 16	16	13-19	4	3-4	3.3	72
Tonnage	Aug. 15	--	G	1	Aug. 15	16	14-17	6	6	5.3	75
		--	G	1	Aug. 15	10	9-11	7	6-7	8.1	70
Booth 8	Sept. 15	16	A	12	Sept. 16	13	6-15	6	3-8	9.3	70
			B	14	Sept. 16	12	7-12	5	4-7	8.8	70
			D	10	Sept. 22	9	7-10	5	3-9	6.5	72
[illegible]ula	Oct. 1	14	A	18	Sept. 16	14	9-16	5	4-5	8.1	73
			B	17	Sept. 16	16	12-17	5	4-5	6.6	73
			D	10	Sept. 29	16	9-17	5	3-5	8.8	72
Booth 7	Oct. 15	14	A	8	Sept. 29	20	14-23	6	4-7	6.5	73
			C	9	Sept. 29	17	13-17	6	4-8	6.2	70
Hickson	Oct. 15	16	A	7	Oct. 13	14	9-15	4	3-7	4.6	70
			C	5	Oct. 13	15	9-19	5	4-6	1.7	70
			H	2	Oct. 18	13	11-15	5	5-6	.7	75
Collinson	Oct. 15	12	D	2	Oct. 27	17	15-19	3	3	4.3	70
Taylor	Nov. 1	16	B	9	Nov. 10	11	9-16	5	4-5	5.2	75
			C	6	Oct. 22	13	11-15	4	4-5	3.6	70
Hall	Nov. 1	16	C	9	Nov. 10	17	14-27	6	5-6	3.8	70
			D	6	Nov. 10	28	21-30	6	5-6	4.5	75
Herman	Nov. 1	10	A	2	Nov. 11	15	13-17	5	5	4.8	80
Booth 1	Nov. 15	15	A	2	Oct. 22	14	14-20	4	4-5	3.7	70
			C	6	Oct. 22	15	14-24	4	4	2.7	70
Booth 3	Nov. 15	14	C	4	Oct. 22	19	14-23	4	3-4	[illegible]	78
			D	10	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Tonnage	Aug. 15	--	C	1	Aug. 15	16	14-17	6	6	9.3	12
		--	C	1	Aug. 15	10	9-11	7	6-7	8.1	70
Booth 8	Sept. 15	16	A	12	Sept. 16	13	6-15	6	3-8	9.3	70
			b	14	Sept. 16	12	7-12	5	4-7	8.8	70
			D	10	Sept. 22	9	7-10	5	3-9	6.5	72
Tula	Oct. 1	14	A	18	Sept. 16	14	9-16	5	4-5	8.1	73
			B	17	Sept. 16	16	12-17	5	4-5	6.6	73
			D	10	Sept. 29	16	9-17	5	3-5	8.8	72
Booth 7	Oct. 15	14	A	8	Sept. 29	20	14-23	6	4-7	6.5	73
			C	9	Sept. 29	17	13-17	6	4-8	6.2	70
Hickson	Oct. 15	16	A	7	Oct. 13	14	9-15	4	3-7	4.0	70
			C	5	Oct. 13	15	9-19	5	4-6	1.7	70
			H	2	Oct. 18	13	11-15	5	5-6	.7	75
Collinson	Oct. 15	12	D	2	Oct. 27	17	15-19	3	3	4.3	70
Taylor	Nov. 1	16	B	9	Nov. 10	11	9-16	5	4-5	5.2	75
			C	6	Oct. 22	13	11-15	4	4-5	3.6	70
Hall	Nov. 1	16	C	9	Nov. 10	17	14-27	6	5-6	3.8	70
			D	6	Nov. 10	28	21-30	6	5-6	4.5	75
Herman	Nov. 1	10	A	2	Nov. 11	15	13-17	5	5	4.6	80
Booth 1	Nov. 15	15	A	2	Oct. 22	14	14-20	4	4-5	3.7	70
			C	6	Oct. 22	15	14-24	4	4	2.7	70
Booth 3	Nov. 15	14	C	4	Oct. 22	19	14-23	4	3-4	4.2	78
			D	10	Oct. 22	13	12-19	4	4-5	3.3	70
Wagner	Dec. 1	14	D	2	Dec. 16	10	9-10	5	4-5	0	72
Choquette	Jan. 1	16	I	1	Dec. 8	48	46-51	3	3-4	3.4	75

1/ Information on maturity requirements (earliest picking date and minimum size) for avocados as proposed by leaders in the industry, published by Mr. Charles H. Steffani, Dade County Agricultural Agent, Homestead, Fla., August 4, 1953.

2/ Number of days at 75°F. does not include rail transit time of 2 or 3 days from Homestead, Fla. to Orlando, Fla.

ranged from 0 to 2.4 percent. The total decay for the 200 lots averaged 1 percent.

Summary

During the 1953-54 season some 200 different lots of avocado fruits representing 16 commercial varieties were tested for maturity and quality. Holding was at 75 degrees F., and information was obtained on number of days required for softening. Softening of fruit was fairly uniform, and the time required for fruit to reach eating quality was 3 to 10 days and averaged 5 days. The loss in weight of fruit during the holding period averaged about 5 percent. Total decay was commercially unimportant and averaged 1 percent. Maturity of fruit within a variety could be fairly well defined on the basis of specified picking dates in conjunction with minimum weight. The stage of maturity of fruit at picking is the most important factor in palatability of avocados.

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5. Wolfe, H. S., Toy, L. R., and Stahl, A. L., Revised by Ruehle, G. D., 1949. Avocado Production in Florida. Fla. Agr. Exp. Sta. Bul. 141 (Agr. Ext. Ser.) Gainesville, Fla.

Hickson, Taylor, Hall, Booth 1, and Booth 3. On the other hand, limited study was with Pollock, Trapp, Pinnelli, Tonnage, Collinson, Herman, Wagner, and Choquette. See Table 1.

Standards based on Picking dates and size of fruit

The general findings showed a close relationship between quality in fruit with definite picking dates and size. Based on the 1953-54 crop year, the proposed standards would have permitted the shipment of fairly satisfactory fruit. The results indicated no change from the proposed minimum standard for Waldin and Lula. However, size of fruit should be slightly increased for Booth 7, and slightly decreased for Booth 8, Hickson, and Taylor. The picking dates should be slightly advanced for Booth 1 and Booth 3. See figure 1.

Large sized fruit in a lot were rated higher in flavor than small sized fruit. See figures 2, 3, and 4. Small fruit often required longer periods to soften at 75°F. and were frequently unpalatable when soft. The flavor was flat, watery, slightly bitter, slightly unpleasant after taste, and texture was rubbery to soft. Palatability was associated with maturity of fruit on the tree. Late harvested fruit had better eating quality than the same variety picked early in the season.

Fruit quality was slightly affected by crop or grove variation and fruit from grove A rated higher than those from grove D (figures 5, 6, and 7).

[fol. 409]

EVIDENCE PRESENTED AT HEARING WITH RESPECT TO PROPOSED MARKETING AGREEMENT OF FLORIDA AVOCADOS. MARCH 8, 1954 .

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U. S. Department of Agriculture
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Maturing, Ripening and Softening of Florida Avocados

by

Earl L. Harding, Earl F. Nelson, and M. Bryan Sunday, Agricultural Marketing Service, Marketing Research Division, U. S. Department of Agriculture, Orlando, Florida; and Roy W. Harkness, University of Florida, Sub-tropical Experiment Station, Homestead, Florida.

The changes that occur in avocados during their maturing, ripening, and softening periods were studied to obtain data that could serve for a practical standard for determining the quality of the fruit. The project was cooperative with the University of Florida, Sub-tropical Experiment Station, Homestead, Florida, leading avocado growers and shippers, Homestead, Florida, and U. S. Department of Agriculture, Orlando, Florida, participating.

Oil Content vs Picking dates and Sizes of fruit

A minimum oil content is the basis for maturity in certain areas that produce avocados. In Florida, a minimum oil standard has not proven practical The reasons are probably due to the large number of commercial varieties grown, their time of harvest, and the wide range of oil content among fruits. In recognition of these conditions, Florida growers and shippers suggested for experimentation, standards based on "picking dates and size of fruit". The proposed standards were published by Mr. Charles H. Steffard, Dade County Agricultural Agent, Homestead, Florida, August 4, 1953. The announcement preceded the marketing of the bulk of the 1953-54 crop.

[fol. 408]

Oil Content Determined at Homestead

The oil content of avocado fruits was given major study at Homestead, Florida. The tests were on comparable fruit to those used in maturing, ripening and softening studies at Orlando, Florida.

Ripening and Quality Studies at Orlando

The work at Orlando included ripening of fruit at 75°F., and the determination of rate of softening, loss in weight, and change in flavor. A score card was devised for testing taste or flavor. All the lots were rated according to the arbitrary standard scale on the score card reproduced below.

SCORE CARD FOR TESTING TASTE OR FLAVOR OF AVOCADOS

Arbitrary Standard	Taste or flavor of fruit	Numerical Rating Range Corresponding to description	Individual Numerical Rating
Green	Green, grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture (Does not meet consumer acceptance)	50 - 59	
Unpalatable	Flat, watery, slightly bitter, slightly unpleasant after taste and rubbery to soft texture (Does not meet consumer acceptance)	60 - 69	
Palatable	Smooth, mellow, watery, satisfactory flavor and firm to soft texture (Meets minimum standard of consumer	70 - 79	

Standards based on Picking dates and size of fruit

Arbitrary Standard	Taste or flaver of fruit	Numerical Rating Range Corresponding to description	Individual Numerical Rating
Green	Green, grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture (Does not meet consumer acceptance)	50 - 59	
Unpalatable	Flat, watery, slightly bitter, slightly unpleasant after taste and rubbery to soft texture (Does not meet consumer acceptance)	60 - 69	
Palatable	Smooth, mellow, watery, satisfactory flaver and firm to soft texture (Meets minimum standard of consumer acceptance)	70 - 79	
Excellent	Smooth, mellow, tasty, rich, nutty with quality of distinct excellence and buttery texture (Excellent)	80 - 100	

Underscore or write in character or characters that determined your rating.

About 200 different lots of fruit, representing 17 commercial varieties were tested. The principal study was with Waldin, Booth 8, Lula, Booth 7, Hickson, Taylor, Hall, Booth 1, and Booth 3. On the other hand, limited study was with Pollock, Trapp, Pinnelli, Tonnage, Collinson, Herman, Wagner, and Choquette. See Table 1.

Standards based on Picking dates and size of fruit

The rate of softening of fruit at 75°F. was fairly uniform and eating condition (1 to 3 pounds) was reached in 3 to 10 days, averaged 5 days.

The loss in weight of fruit during the softening period at 75°F. averaged about 5 percent.

[fol. 411]

Ex 6

Table 1. Maturity of Avocados in relation to picking dates and size of fruit, 1953-54.

Variety	Picking Date 1/	Size 1/	Grower	Lots Tested	Earliest Picking Date	Size (oz.) Minimum	Size (oz.) Range	Days at 75°F. 2/ Average	Days at 75°F. 2/ Range	Loss in Weight at 75°F.	Numerical Flavor Rating
		oz.								Pct.	
Fuchs	June 15	14		None							
Pollock	July 1	16									
Simmonds	July 1	16		None							
Waldin	August 7	16	A	6	August 12	15	9-18	6	4-10	5.3	72
			B	7	August 12	14	7-17	7	6-10	8.2	72
			C	2	August 12	15	11-16	6	4-11	6.9	72
			J	1	August 5	14	6-15	6	5-7	.5	70
			D	1	August 19	16	14-17	5	3-7	4.7	75
Trapp	August 15	14	D	1	August 19	14	13-16	6	3-7	6.5	72
			F	1	August 16	14	10-15	4	3-6	7.7	70
Pinnelli	August 15	14	F	1	Sept. 16	16	13-19	4	3-4	3.3	72
Tonnage	August 15	--	G	1	August 15	16	14-17	6	6	5.3	75
		--	G	1	August 15	10	9-11	7	6-7	8.1	70
Booth #8	Sept. 15	16	A	12	Sept. 16	13	6-15	6	3-8	9.3	70
			B	14	Sept. 16	12	7-12	5	4-7	8.8	70
			D	10	Sept. 22	9	7-10	5	3-9	6.5	72
Lula	Oct. 1	14	A	18	Sept. 16	14	9-16	5	4-5	8.1	73
			B	17	Sept. 16	16	12-17	5	4-5	6.6	73
			D	10	Sept. 29	16	9-17	5	3-5	8.8	72
Booth #7	Oct. 15	14	A	8	Sept. 29	20	14-23	6	4-7	6.5	73
			C	9	Sept. 29	17	13-17	6	4-8	6.2	72

1/ Temporary picking dates and sizes recommended by Growers and Shippers and published August 4, 1953 by Charles H. Steffani, Dade County Agricultural Agent, P. O. Box 112, Homestead, Fla.

2/ The softening period at 75°F. does not include time of transit of 2 or 3 days from Homestead, Florida to Orlando, Florida.

Table 1. Maturity of Avocados in relation to picking dates and size of fruit, 1953-54. (Continued)

Variety	Picking Date 1/	Size 1/	Grower	Lots Tested	Earliest Picking Date	Size (oz.) Minimum	Size (oz.) Range	Days at 75°F. 2/ Average	Days at 75°F. 2/ Range	Loss in Weight at 75°F.	Numerical Flavor Rating
		oz.								Pct.	
Hickson	Oct. 15	16	A	7	Oct. 13	14	9-15	4	3-7	4.0	70
			C	5	Oct. 13	15	9-19	5	4-6	1.7	70
			H	2	Oct. 18	13	11-15	5	5-6	.7	75
Collinson	Oct. 15	12	D	2	Oct. 27	17	15-19	3	3	4.3	70
Taylor	Nov. 1	16	B	9	Nov. 10	11	9-16	5	4-5	5.2	75
			C	6	Oct. 22	13	11-15	4	4-5	3.6	70
Hall	Nov. 1	16	C	9	Nov. 10	17	14-27	6	5-6	3.8	70
			D	6	Nov. 10	28	21-30	6	5-6	4.5	75
Herman	Nov. 1	10	A	2	Nov. 11	15	13-17	5	5	4.8	80
Monroe	Nov. 1	10		None							
Booth #1	Nov. 15	15	A	2	Oct. 22	14	14-20	4	4-5	3.7	70
			C	6	Oct. 22	15	14-24	4	4	2.7	70
Booth #3	Nov. 15	14	C	4	Oct. 22	19	14-23	4	3-4	4.2	70
			D	10	Oct. 22	13	12-19	4	4-5	3.3	70
Fuchs	Dec. 1	14	D	2	Dec. 16	10	9-10	5	4-5	0	72
Tabal	Dec. 15	16		None							
Choquette	Jan. 1	16	I	1	Dec. 8	48	46-51	3	3-4	3.4	75
Itzamna	Feb. 1	16		None							

1/ Temporary picking dates and sizes recommended by Growers and Shippers and published August 4, 1953 by Charles H. Steffani, Dade County Agricultural Agent, P. O. Box 112, Homestead, Fla.

2/ The softening period at 75°F. does not include time of transit of 2 or 3 days from Homestead, Florida to Orlando, Florida.

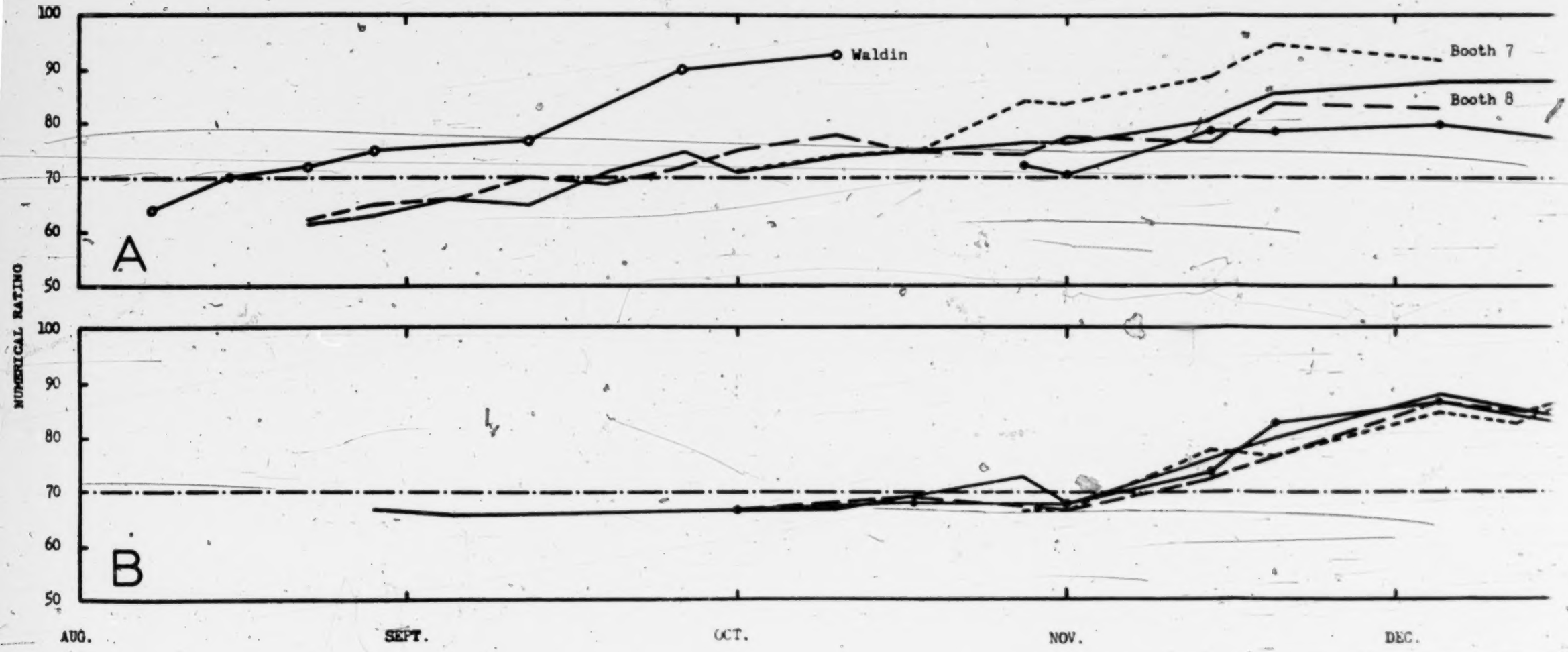
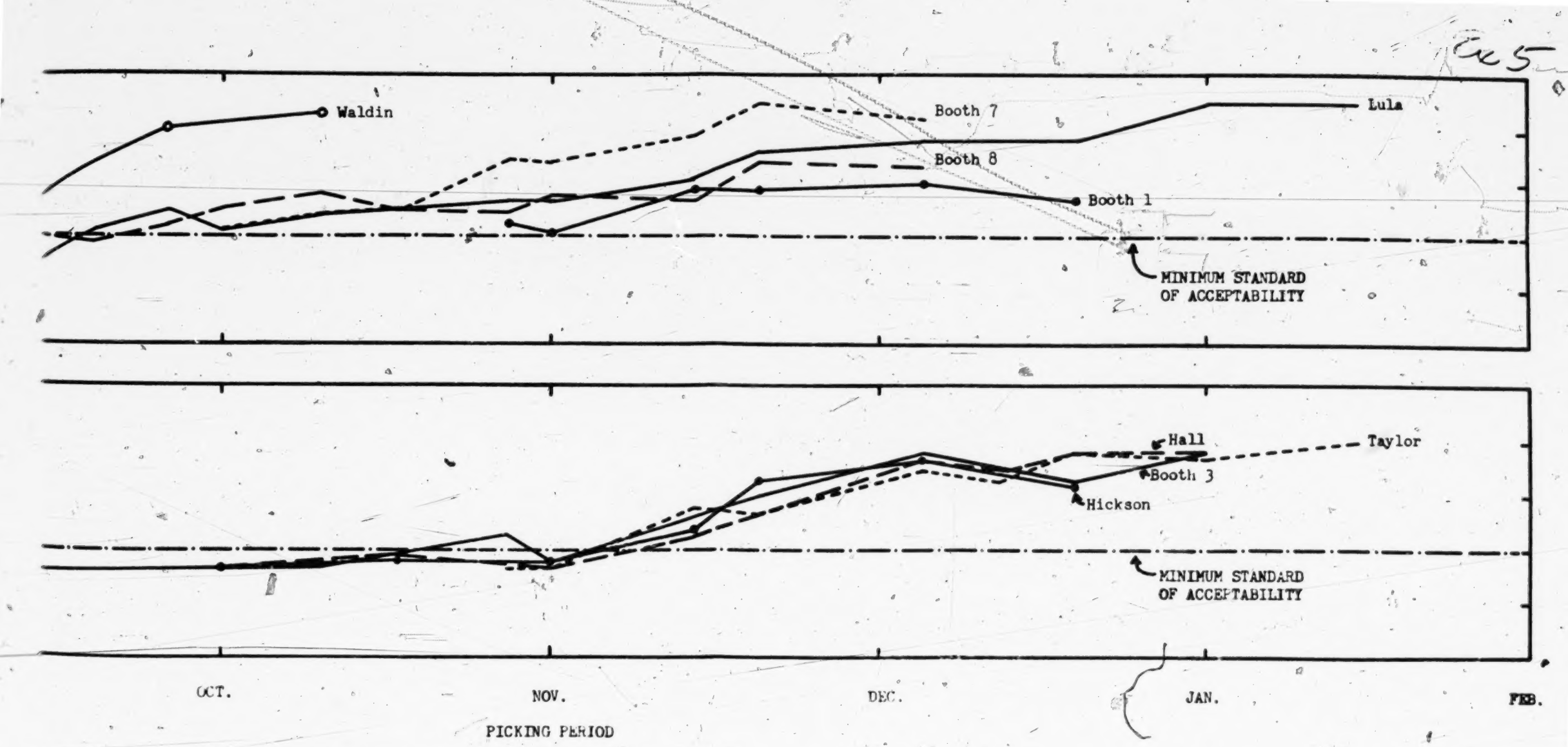


Figure 1.—Seasonal changes in palatability of Florida avocados. A and B represent the principal early and midseason varieties. 1953-54.



ados. A and B represent the principal early and midseason varieties. 1953-54.

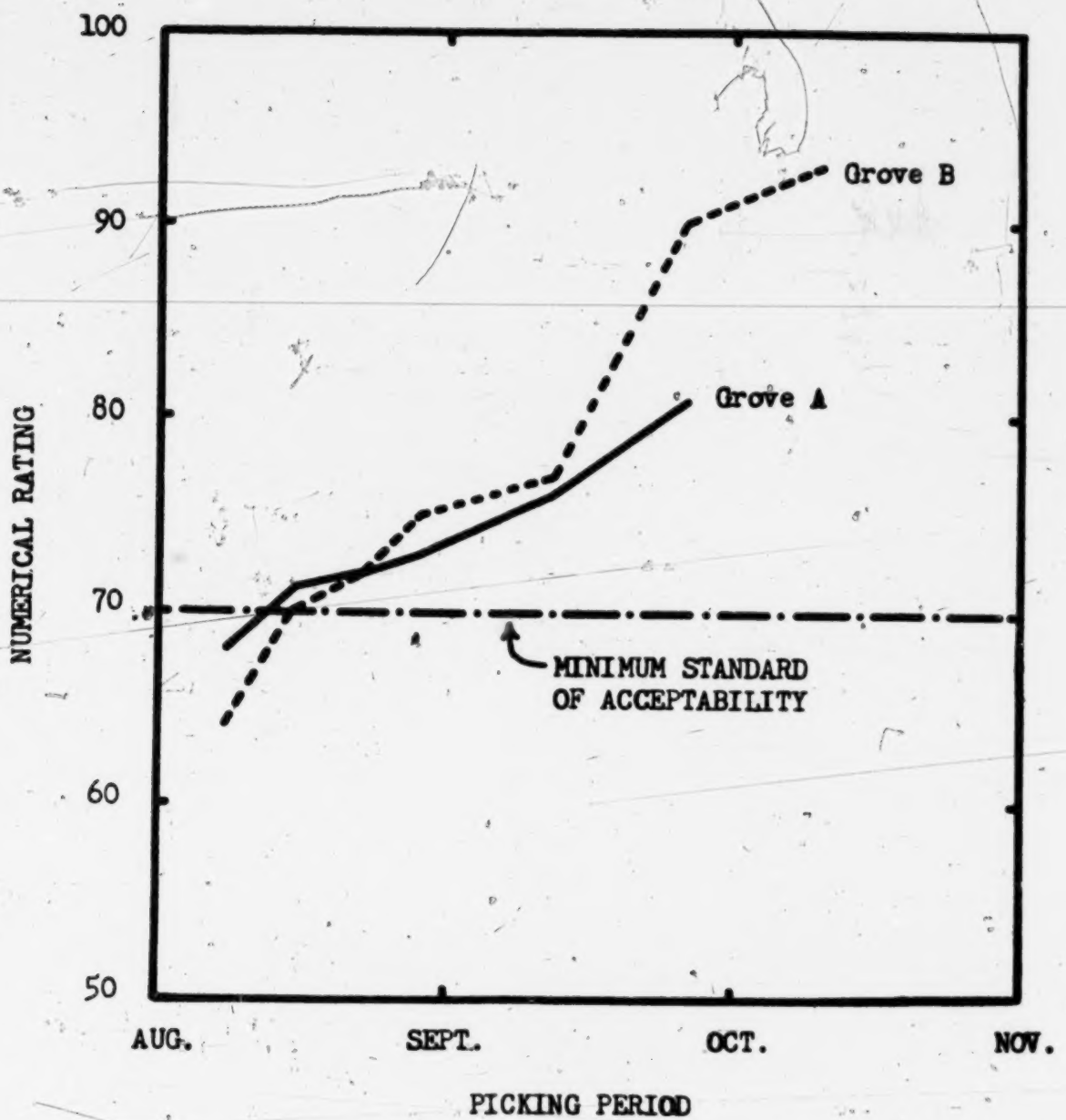


Figure 2.--Effect of crop or grove variation on the palatability of Waldin avocados, 1953.

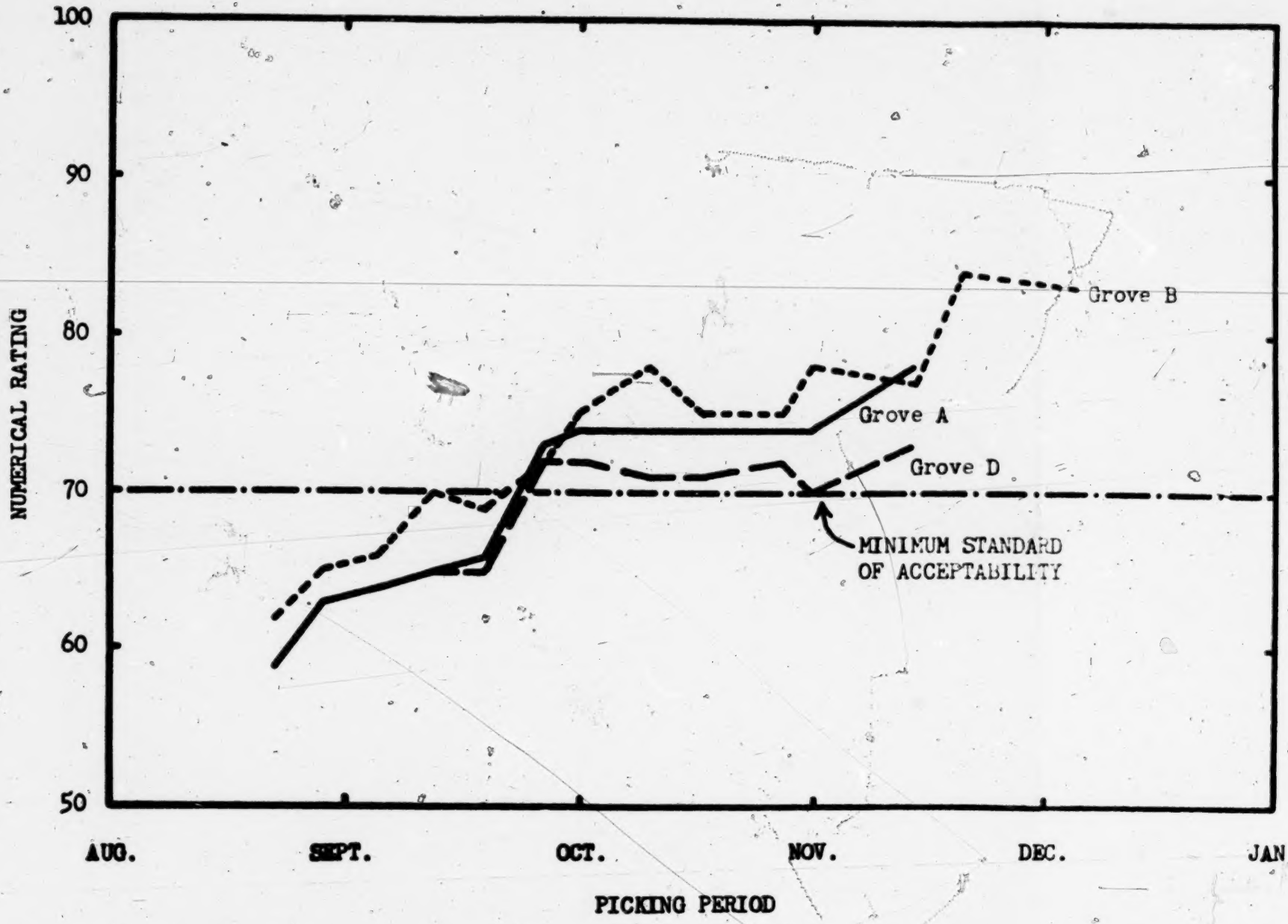


Figure 3.--Effect of crop or grove variation on the palatability of Booth 8 avocados, 1953-54.

[fol. 416]

Ex 9

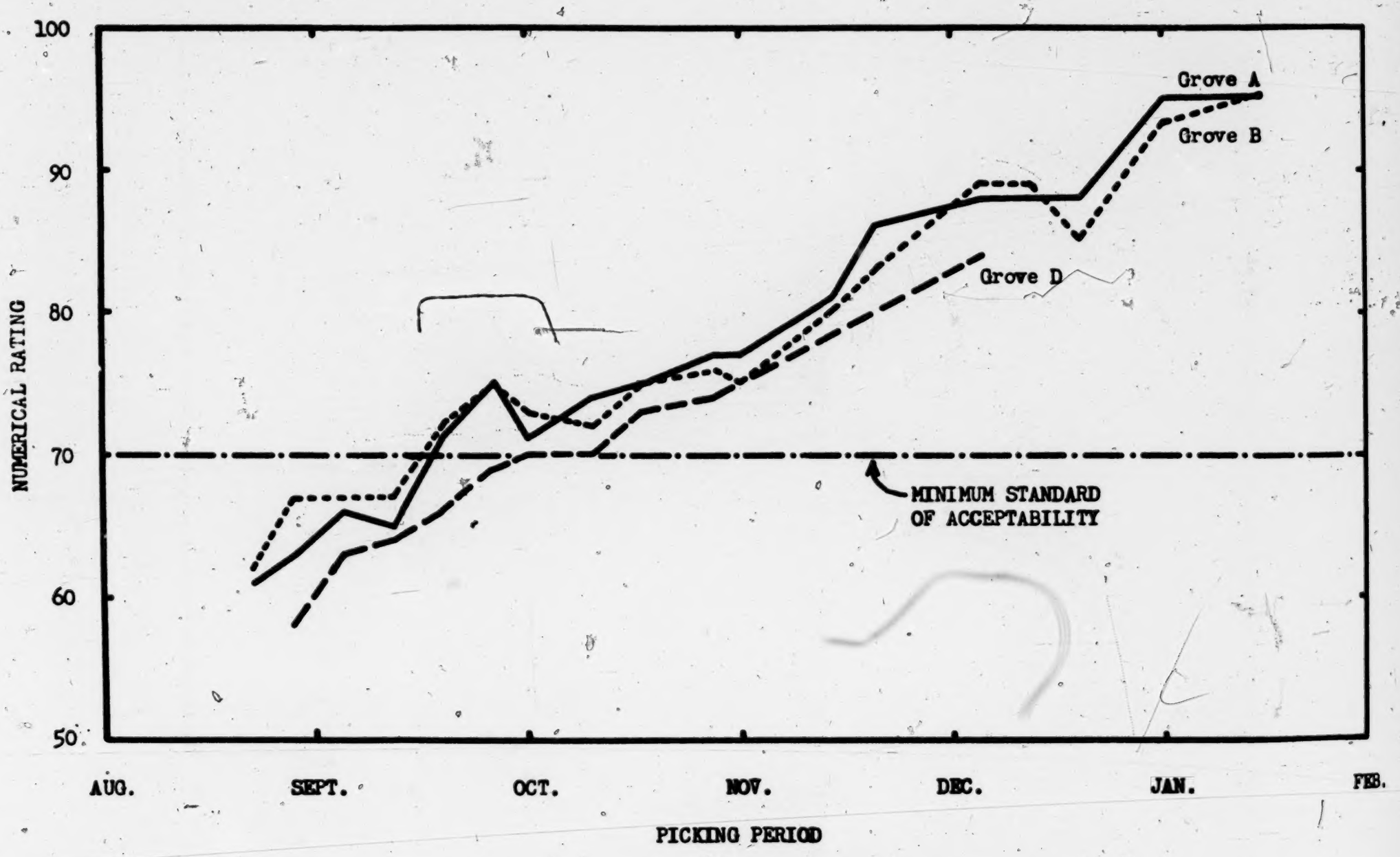


Figure 4.--Effect of crop or grove variation on the palatability of Lula avocados, 1953-54.

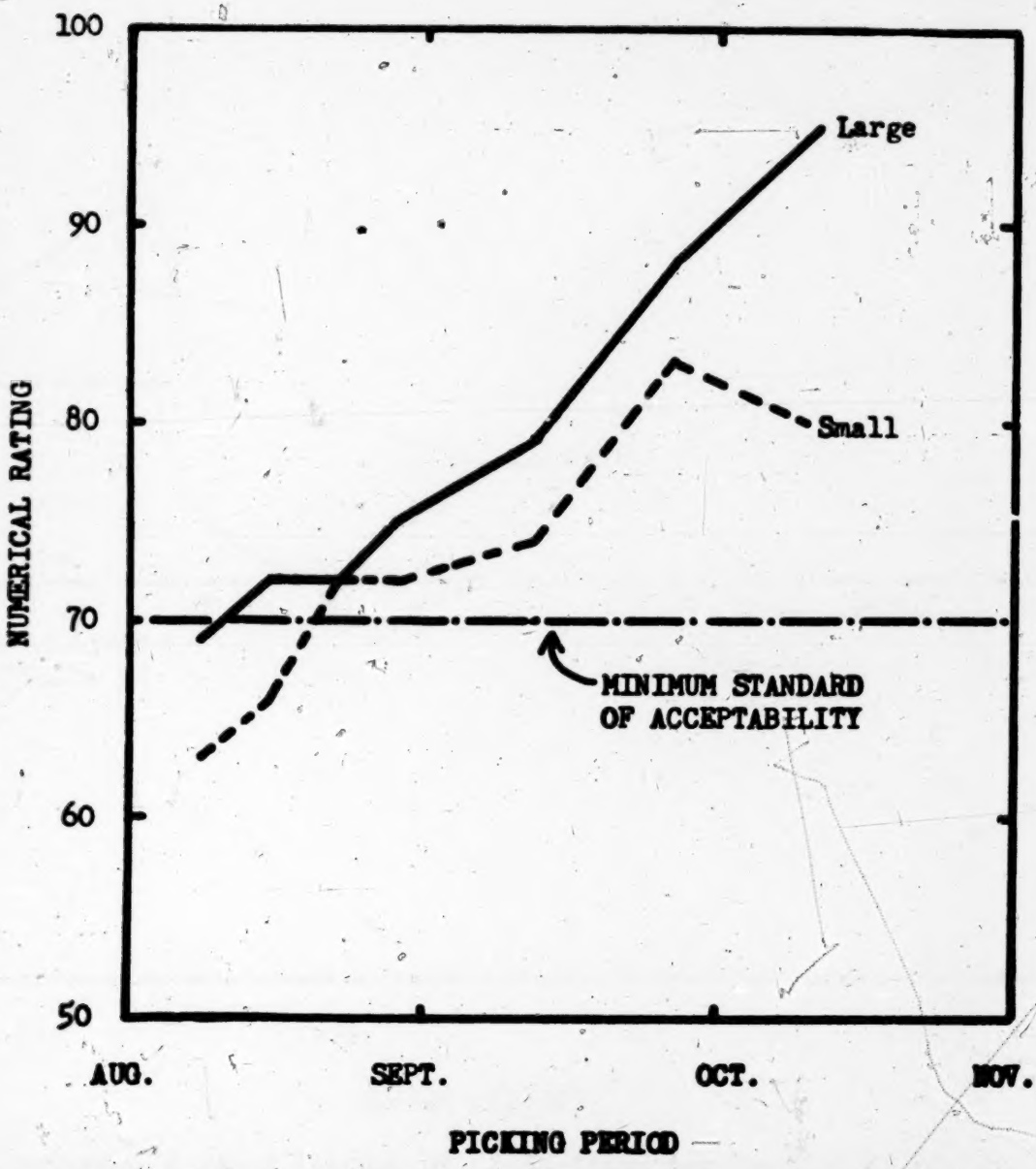


Figure 5.--Large (14 to 21 ounces) and small (9 to 17 ounces) Waldin avocados and palatability at different picking periods. Results based on averages of 3 crops of fruit, 1953.

[fol. 418]

Ex 11

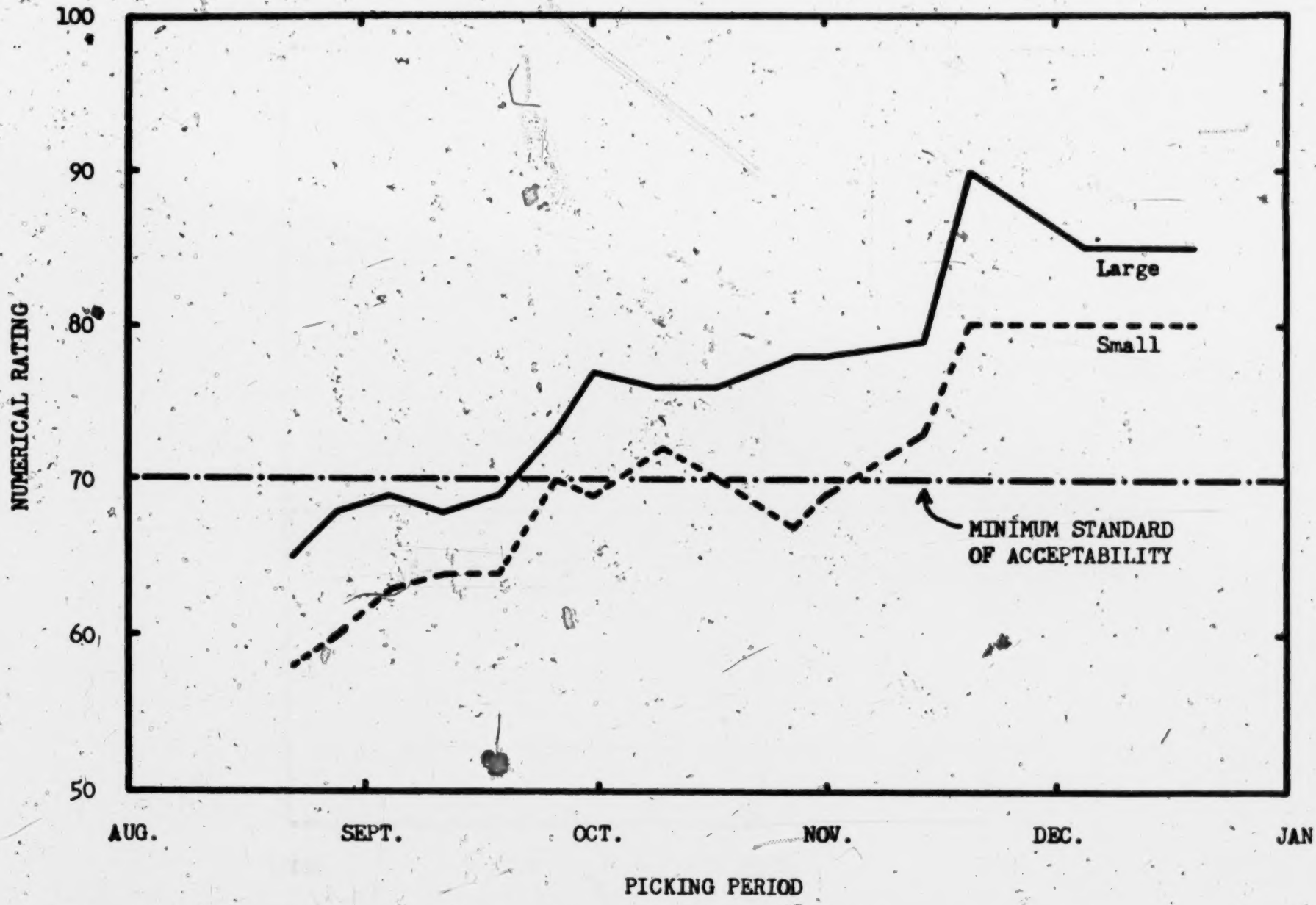


Figure 6.--Large (11 to 18 ounces) and small (6 to 10 ounces) Booth 8 avocados and palatability at different picking periods. Results based on averages of 3 crops of fruit, 1953-54.

[fol. 419]

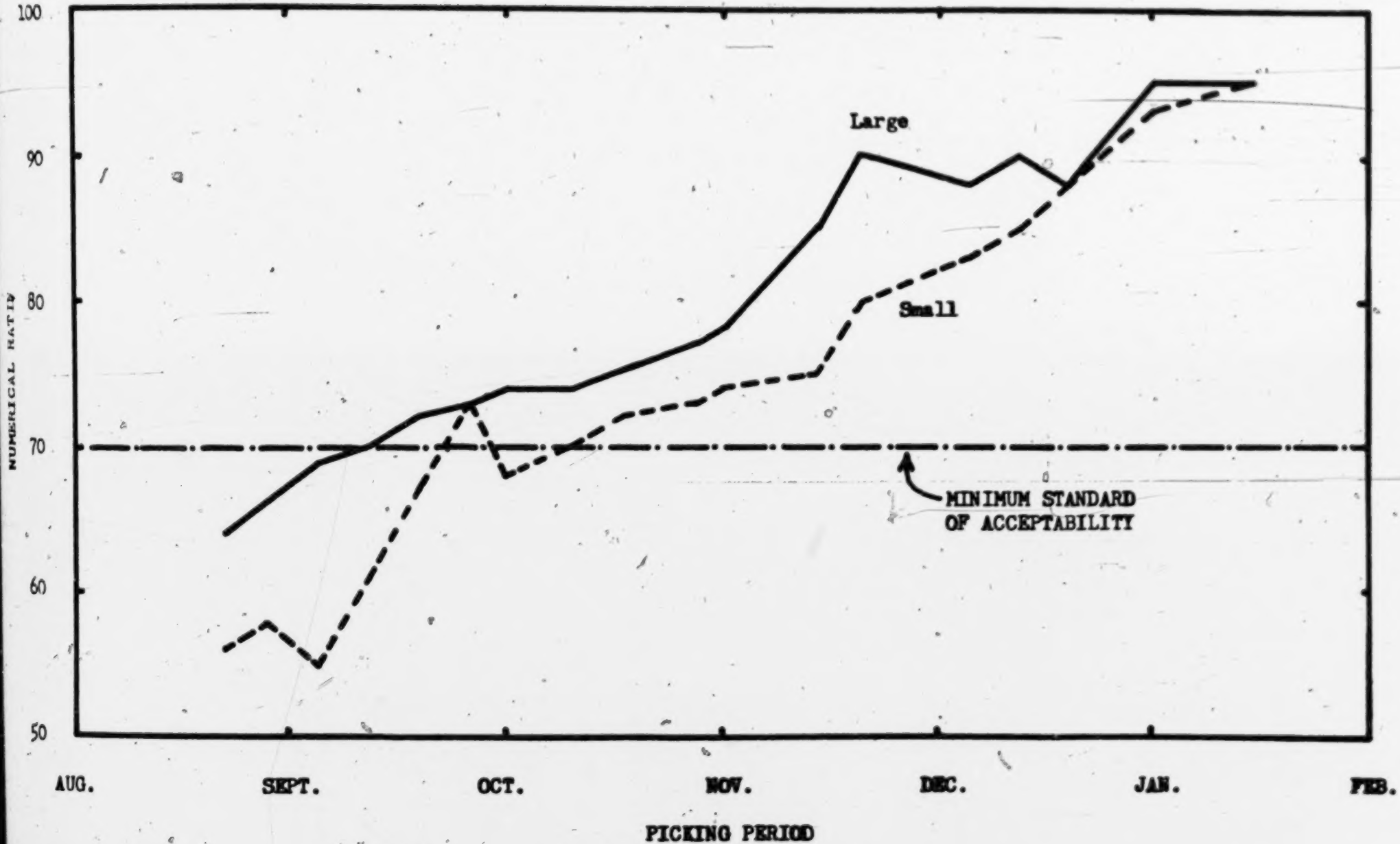


Figure 7.--Large (13 to 23 ounces) and small (9 to 15 ounces) Lula avocados and palatability at different picking periods. Results based on averages of 3 crops of fruit, 1953-54.

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General Information on Avocado Research - 1954-55

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Growers

A	Brooks	I	Futch
B	F.L.A.G.	J	Ward
C	Kendall	K	Krome
D	Boe	L	Ross
E	Tower	M	Harkness
F	Ames	N	Subtropical Expt. Sta.
G	Rheney	O	FEC. Fert. Co.
H	de Guise	P	White

Samples - about 60 fruits - 30 tested for oil at Homestead
30 tested for flavor at Orlando

Pressure tests - 5/16 inch plunger on 5 Hard fruit
7/16 inch plunger on Soft fruit

Softening temperature - Days to soften at 80°F.

Holding temperature - 50°F. until all fruits softened

Flavor - Based on score card 80 of good fruit. Flavor of fruit tabulated for weight classes.

Tasters - 10 or more staff members:
Soule, Harding, Sunday, Forest, Winston, Meckstroth, Parker, Norman, Dudak, Welty, Selhine, Melvin.

Method of tasting - Lots divided into below and above weight class. Tasters rated composite based on diced-up flesh samples.

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Samples that did not meet consumer approval during picking period for the variety.

Variety	Experimental - 1954-55			Florida Avocado Administrative Committee Regulations for 1955-56	
	Date	Weight Ounces	Flavor Numerical Rating	Date	Weight Ounces
Nadir	7-30	13	73	6-27	12
Collinson 1/	8-25	15	61	10-17	16
Collinson 2/	10-11	18	72	--	--
Hickson 1/	8-25	22	65	10-17	14
Hickson 3/	10-11	14	74	--	--
Nelson	9-24	18	63	10-24	16
Nirody	9-24	18	67	9-19	18
Vaca	9-24	15	63	10-3	16
Simpson	9-28	16	67	7-4	16
Booth 5	9-28	13	66	10-17	16

1/ Boe Grove

2/ Subtropical Experiment Station Grove

3/ Rheney Grove

[fol. 421]

Varieties and Sampling - 1954-55

Variety	Groves tested	Lots tested	Fruit tested	Sampling period
Fuchs	2	5	106	6-2 to 7-9-54
Waldin	3	20	585	7-19 to 9-7-54
Nadir	1	1	15	7-30-54
Hardee	1	1	6	7-30-54
Trapp	2	2	44	7-30 to 8-24-54
Tonnage	6	14	404	8-12 to 9-24-54
Hickson	2	5	131	8-12 to 10-11-54
Booth 8	5	30	945	8-12 to 11-1-54
Lula	4	41	1254	8-12 to 12-27-54
Pinelli	1	1	30	8-24-54
Simpson	2	4	128	8-24 to 9-28-54
Fairchild	1	5	151	8-25 to 9-24-54
Nelson	1	5	134	8-25 to 9-24-54
Nirody	1	5	136	8-25 to 9-24-54
Vaca	1	5	150	8-25 to 9-24-54
Collinson	2	2	61	8-25 to 10-11-54
Booth 5	1	3	96	9-10 to 9-28-54
Ajax (Booth 7B)	3	7	212	9-10 to 11-8-54
Booth 7	5	13	388	9-13 to 12-13-54
Choquette	2	3	40	11-1 to 11-29-54

Variety	Groves tested	Lots tested	Fruit tested	Sampling period
Booth 3	2	4	120	11-1 to 11-29- 54
Hall	3	6	175	11-1 to 12-6-54
Booth 1	2	6	182	11-1 to 12-13-54
Taylor	2	7	208	11-1 to 12-13-54
Eagle Rock	1	1	15	12-13-54
McDonald	1	1	13	12-13-54
Nabal	1	3	82	12-13-54 to 1-10-55
Wagner	1	3	92	12-13-54 to 1-10-55
Linda	1	2	47	12-13-54 to 1-10-55
Itzamna	1	2	20	12-27-54 to 1-10-55
Schmidt	1	2	13	12-27-54 to 1-10-55
31 varieties	62	209	5983	6-2-54 to 1-10-55

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RELATION OF MATURITY OF FLORIDA AVOCADOS TO PHYSICAL CHARACTERS

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Growers and shippers of Florida avocados have had difficulty for many years in determining the degree of maturity of fruit of the numerous varieties which are grown in the State. Persistent complaints of immature fruit and low market prices led the industry to make an avocado marketing agreement with the U. S. Department of Agriculture in 1954. About 400,000 bushels (*1*)[2] were shipped during the 1954-55 season under regulated dates of picking and minimum weights for some 40 varieties.

The present investigation was a continuation of research on maturity of avocados reported by Harding (*2*). The objectives were to obtain additional data on the relation of palatability of avocados to picking date and fruit weight and to obtain information on other factors that might be associated with maturing and softening of fruit, such as diameter, number of days required to soften, and loss in weight.

MATERIALS AND METHODS

Most of the avocados used in this investigation were grown in Dade County, but a few samples were obtained from groves in Highlands and Palm Beach Counties, Florida. The samples, which were shipped to Orlando by express, had a transit period of 2 or 3 days. During the 1954-55 season (June 2, 1954 to Jan. 10, 1955) samples of avocados of 31 varieties from 16 groves were tested at Orlando. The varieties studied were Fuchs, Nadir, Hardee, Waldin, Trapp, Pinelli, Tonnage, Fairchild, Booth 8, Nirody, Simpson, Vaca, Booth 5, Booth 7, Collinson, Lula, Hickson, Nelson, Ajax (Booth 7 B), Booth 3, Hall, Taylor, Booth 1, Linda, Wagner, Choquette, Nabal, Eagle Rock, Itzamna, McDonald and Schmidt.[3]

The samples were composed of about 30 fruit of each variety. Fruit were picked at random and were of a wide range in sizes. Most varieties were tested over a fairly long period by sampling at intervals of 7 to 10 days.

On arrival at Orlando each fruit was numbered, weighed and calipered. Five hard fruit of each sample were tested immediately. The remainder of the sample was stored at 80° F. for softening. Daily inspection of individual fruit was made. When it attained the desired degree of softness, each fruit was removed to 50° F. until the entire sample had softened. The tests included weight, diameter, number of days required to soften at 80° F. and flavor of the softened avocados. Fruit which tasted poor was considered green and immature while that which tasted good was considered mature. Fruit of the good category were smooth, mellow, tasty, rich, and nutty with a buttery texture. Each sample was rated on its own merit and no attempt was made to compare palatability ratings of different varieties.

RESULTS AND DISCUSSION

The findings herein are for a single season and should be regarded as tentative. However, the results for most of the varieties were in substantial agreement with the data previously reported by Harding (*2*).

Summer Varieties:—Earliest picking dates, minimum weights, number of days required for softening at 80° F., and loss in weight of summer varieties of avocados which met consumer approval are shown in Table 1. Good

[1]/Appreciation is expressed to Charles H. Steffani, formerly Dade County agricultural agent, the Florida Avocado Administrative Committee, growers, and shippers for their generous support and for fruit used in the investigation and to Roy W. Harkness, associate chemist, Florida Sub-Tropical Experiment Station, Homestead, for his cooperation. Acknowledgment of assistance is made to W. T. Pentzer, chief, Biological Sciences Branch, Beltsville, Md., and to Earl F. Nelson and Ernest Forrest, formerly biological aids, Quality Maintenance and Improvement Section, Orlando, Florida.

[2]/Italic numbers in parentheses refer to Literature Cited.

[3]/Varieties are listed in the order given by Florida Avocado Administrative Committee bulletins.

quality was attained by 16-ounce fruit of Fuchs on July 9, 17-ounce fruit of Hardee on July 30, 15-ounce fruit of Trapp on July 30, 31-ounce fruit of Pinelli on Aug. 24, and 13-ounce fruit of Waldin on Aug. 2 or Aug. 9. The number of days required for softening at 80° F. ranged from 2 to 7. Loss in weight during softening varied from 5 to 7 percent. There was apparently little connection between flavor and number of days required for softening or loss in weight.

Fall Varieties:—Earliest picking dates, minimum weights, minimum diameters, number of days required for softening at 80° F., and loss in weight of fall varieties of avocados which met consumer approval are presented in Table 2. In most instances, the minimum weight for fruit of good quality decreased steadily as the season of picking for a variety progressed. There were, however, variations in the earliest picking dates for fruit of the same weight picked from different groves. For example, 19-ounce Lula fruit from grove A were of good quality on Nov. 1 and from grove C on Oct. 11. Fruit of given weight and variety had a rather narrow range in diameter which remained constant over the entire period of picking. Palatability of fruit at any date of picking was associated with a minimum weight and a corresponding minimum diameter. For example, Booth 7 fruit weighing 11 ounces had a minimum diameter of 3.4 inches on Nov. 15, Dec. 6 and Dec. 13. The number of days required for softening at 80° F. ranged from 1 to 6. Loss in weight varied from less than 2 to 8 percent. There seemed to be little connection between flavor and physical characters other than picking date, weight or diameter.

Winter Varieties:—Earliest dates of picking, minimum weights, minimum diameters, number of days required for softening at 80° F., and loss in weight of Winter varieties of avocados which met consumer approval are given in Table 3. Good quality was attained by 23-ounce Linda fruit on Dec. 13, 10-ounce Wagner fruit on Jan. 10, 33-ounce Choquette fruit on Nov. 15, 16-ounce Nabal fruit on Dec. 13, and 22-ounce Eagle Rock fruit on Dec. 13. Minimum diameter for consumer approval ranged from 3.1 inches for 10-ounce fruit of Wagner and Nabal to 4.6 inches for 33-ounce fruit of Choquette. The number of days required for softening varied from 4 to 6. Loss in weight during softening was from 3 to 5 percent.

Progress of Maturity in Fruit of Similar Weight:—When samples of any variety were

Table 1. Earliest picking date, minimum weight, number of days required for softening at 80° F. and loss in weight of summer varieties of Florida avocados which met consumer approval in tests at Orlando, 1954-55.

Variety [1]	Grove	Picking period	Earliest picking date for minimum maturity	Minimum fruit weight	Softening period 80° F.	Loss in weight
		1954-55	1954-55	Ounces	Days	Percent
Fuchs	A	June 14-July 9	July 9	16	2	5
Hardee	K	July 30	July 30	17	2	6
Trapp	K	July 30	July 30	15	4	5
Pinelli	P	Aug. 24	Aug. 24	31	6	7
Waldin	C	Aug. 2-Sept. 7	Aug. 9	13	7	6
	F	Aug. 2-Sept. 7	Aug. 2	13	5	7
			Aug. 9	17	6	6
	G	July 19-Sept. 7	Aug. 9	13	5	6

[1] Samples of Nadir did not meet consumer approval during the picking period for the variety.

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divided into subsamples according to predetermined weight classes, large fruit received a higher flavor rating than small fruit after softening. This trend remained fairly consistent throughout the picking period of a variety. Data for Lula are presented in Figure 1.

Lula fruit weighing 16 to 18 ounces received acceptable quality about 10 days earlier than the 18- to 15-ounce size, and the latter about a week earlier than the 10- to 12-ounce size.

Evaluating Maturity.—Data for Booth 8, Booth 7, Lula, Hickson, Hall, Taylor, and

Table 2. Earliest picking date, minimum weight, minimum diameter, number of days required for softening at 80° F., and loss in weight of fall varieties of Florida avocados which met consumer approval in tests at Orlando, 1954-55.

Variety 1/	Grove	Picking period	Earliest picking date for minimum maturity	Minimum fruit weight	Minimum fruit diameter	Softening period at 80° F.	Loss in weight
		1954-55	1954-55	Ounces	Inches	Days	Percent
Tonnage	K	Aug. 25-Sept. 24	Sept. 17	16	--	5	6
Fairchild	K	Aug. 25-Sept. 24	Sept. 3	24	--	3	4
			Sept. 17	24	--	1	2/
Booth 8	A	Aug. 23-Oct. 11	Oct. 11	13	3.3	4	4
	C	Aug. 16-Nov. 1	Oct. 11	13	3.4	5	4
			Nov. 1	10	2.7	5	4
Booth 7	C	Sept. 20	Sept. 20	24	4.3	4	8
	G	Sept. 13-Dec. 13	Nov. 15	11	3.4	4	6
			Dec. 6	21	3.8	5	7
			Dec. 13	11	3.4	4	4
	M	Nov. 29-Dec. 6	Nov. 29	10	3.0	5	5
			Dec. 6	8	2.9	6	5
	N	Nov. 15	Nov. 15	12	3.3	4	4
Lula	A	Aug. 23-Dec. 27	Nov. 1	29	3.9	6	5
			Nov. 8	13	3.2	5	4
	C	Aug. 23-Dec. 27	Oct. 11	19	3.7	5	5
			Nov. 1	16	3.5	6	4
			Nov. 15	24	3.4	5	4
			Nov. 29	13	3.3	5	4
Ajax(Booth 7B)	A	Nov. 1-Nov. 8	Nov. 1	13	3.5	6	4
Booth 3	B	Nov. 8-Nov. 29	Nov. 29	16	3.7	4	4
	C	Nov. 1-Nov. 8	Nov. 1	19	3.9	5	5
Hall	B	Nov. 1-Nov. 15	Nov. 1	22	3.8	5	5
			Nov. 8	17	3.5	5	4
	G	Nov. 1	Nov. 15	14	3.3	5	4
	M	Nov. 29-Dec. 6	Nov. 1	28	4.1	5	5
			Nov. 29	14	3.3	6	4
Taylor	G	Nov. 1-Dec. 13	Nov. 29	13	3.2	5	3
Booth 1	B	Nov. 1-Nov. 29	Nov. 15	16	3.7	4	5
			Nov. 29	16	3.8	5	3
	G	Nov. 1-Dec. 13	Dec. 13	13	3.4	6	4

1/ Samples of Nirody, Simpson, Vaca, Booth 5, Collinson, Hickson, and Nelson did not meet consumer approval during the picking period for the variety.

2/ Less than 2 percent.

Table 3. Earliest picking date, minimum weight, minimum diameter, number of days required for softening at 80° F., and loss in weight of winter varieties of Florida Avocados which met consumer approval in tests at Orlando, 1954-55.

Variety 1/	Grove	Picking period	Earliest picking date for minimum maturity	Minimum fruit weight	Minimum fruit diameter	Softening period 80° F.	Loss in weight
		1954-55	1954-55	Ounces	Inches	Days	Percent
Linda	N	Dec. 13-Jan. 10	Dec. 13	23	3.8	4	4
			Jan. 10	19	3.7	5	4
Wagner	N	Dec. 13-Jan. 10	Jan. 10	10	3.1	6	4
Choquette	B	Nov. 1-Nov. 15	Nov. 15	33	4.6	4	3
	N	Nov. 29	Nov. 29	29	4.1	5	4
Nabal	N	Dec. 13-Jan. 10	Dec. 13	16	3.6	5	3
			Dec. 27	11	3.2	6	4
			Jan. 10	10	3.1	6	5
Eagle Rock	N	Dec. 13	Dec. 13	22	3.7	6	4

1/ Samples of Itzamna, McDonald, and Schmidt did not meet consumer approval during the picking period for the variety.

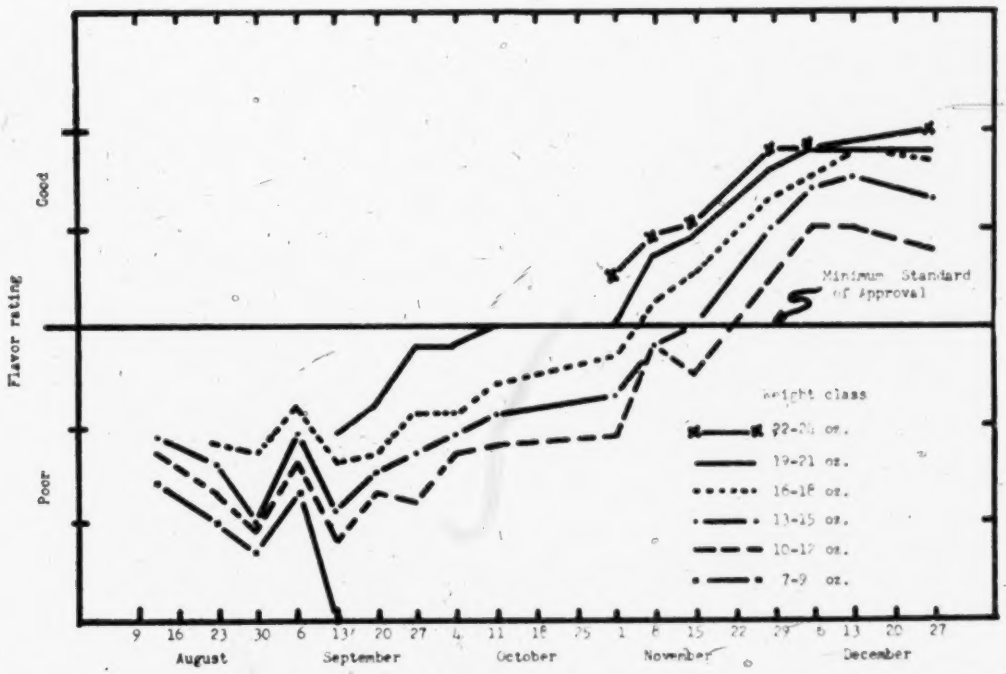


Figure 1. Relation of average flavor ratings of Lula avocados in various weight classes to picking dates, 1954. Each average is based on fruit from 2 or 3 groves.

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Booth 1 avocados were subjected to a series of regression analyses in which individual factors, such as picking date (expressed as weeks after the first picking), fruit weight, fruit diameter, ratio of weight to diameter, percentage loss in weight, number of days required for softening at 80° F., weight of hard fruit tested immediately on arrival at Orlando and diameter of hard fruit, were tested singly and in combinations of 2 or 3 against flavor rating. Representative analyses for Lula variety are listed in Table 4. It will be noted that analyses in which picking date was included as one of the independent variables always gave very large correlation coefficients. Fruit weight or fruit diameter used as independent variables in simple regression analyses gave lower correlation coefficients but still too large to be the result of chance variations in sampling. The multiple correlation coefficient with flavor rating resulting when three independent variables, picking date, fruit weight, and fruit diameter, were used was essentially identical to the multiple correlation with numerical taste rating when two independent variables, picking date and the ratio of fruit weight to fruit diameter, were used. Percentage loss in weight and number of days required for softening, individually or in combination, were poorly related to numerical taste rating so are not

Table 4. Correlation coefficients, standard errors of regression, and regression equations for analyses of various independent factors with taste ratings of Lula avocados, 1954-55.

Analysis number 1/	Independent variable	Correlation coefficient (r or R) 2/	Standard error of regression ($s_{y.x}$) 3/	Regression equation 4/
1	Picking date (X) 5/	r = .9807**	2.72	$\hat{Y} = 2.57X + 59.30$
2	Fruit weight (X)	r = .940**	4.78	$\hat{Y} = 8.93X - 63.56$
3	Fruit diameter (X)	r = .9264**	5.22	$\hat{Y} = 123.2X - 354.34$
4	Picking date (X_1); fruit weight (X_2)	R = .9864** y12	2.40	$\hat{Y} = 1.94X_1 + 2.48X_2 + 24.44$
5	Picking date (X_1); fruit diameter (X_2)	R = .9832** y12	2.67	$\hat{Y} = 2.14X_1 + 23.50X_2 - 20.22$
6	Picking date (X_1); ratio fruit weight/diameter (X_2)	R = .9905** y12	2.05	$\hat{Y} = 1.80X_1 + 15.73X_2 - 6.13$
7	Picking date (X_1); fruit diameter (X_2); fruit weight (X_3)	R = .9900** y123	2.19	$\hat{Y} = 2.00X_1 - 80.35X_2 + 7.79X_3 + 221.47$

1/ In each case the dependent variable (Y) was flavor rating and the number of items (n) = 12.

2/ Significant values of r with (n-2) degrees of freedom at odds of 99 to 1 and 19 to 1 are .708 and .576, those for R with (n-3) degrees of freedom .735 and .602 and for R with (n-4) degrees of freedom .765 and .602.

3/ Variation in dependent variable (Y) not explained by changes in the independent variable (X).

4/ $\hat{Y}$ signifies the predicted or expected value of Y.

5/ Expressed as weeks after first picking; Sept. 13 = 1.

given in Table 4. Weight or diameter of hard fruit gave lower correlations with numerical taste rating than the respective measurements for soft fruit. Similar results were obtained with other varieties.

The values in Table 4 for Lula avocados indicate that tests for maturity and palatability of fruit would gain slightly in precision by the addition of fruit diameter to picking date and fruit weight as independent variables. There appeared to be a straight-line relation between picking date, fruit weight and fruit diameter and flavor rating from immaturity to post-maturity.

Summary

During the 1954-55 season, 209 different samples of avocado fruits of 31 varieties from 16 groves were tested for maturity and quality. Earliest picking dates, minimum weights, minimum diameters, number of days required for softening at 80° F., and loss in weight of summer, fall and winter varieties of avocados which met consumer approval were determined. Variations in the minimum weight of fruit of good quality picked from different groves on the same date or of the same weight but picked on different dates were noted for a number of varieties. Fruit diameter of fall varieties ranged from 2.9 inches for 8-ounce fruit to 4.3 inches for 24-ounce fruit of Booth 7 and of winter varieties from 3.1 inches for 10-ounce fruit of Wagner and Nabal to 4.6 inches for 33-ounce fruit of Choquette. The number of days required for softening at 80° F. varied from 1 to 7. Loss in weight during softening ranged from less than 2 to 8 percent. Large fruit of a variety were rated higher than small fruit and this trend remained fairly constant throughout the picking season. There appeared to be a straight-line relationship between picking date, fruit weight and fruit diameter and flavor rating from immaturity to post-maturity for Lula, Booth 8, Booth 7, Hickson, Taylor and Booth 1 varieties. Percentage loss in weight and number of days required for softening were poorly related to flavor.

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General Information on Avocado Research, 1955-56.

RELATION OF MATURITY TO CERTAIN CHEMICAL AND PHYSICAL CHARACTERS IN FLORIDA AVOCADOS

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Growers: Ames, Kendall, Krome, Rheney, Brooks, Watts, Kent, Rowe, Futch, Kinard, White

Samples: About 60 fruits - 30 tested for chemical constituents at Miami
30 tested for flavor at Orlando

All varieties sampled at weekly intervals. All fruit from the same trees, using 15 fruits per lot. Each lot was composited for the test.

Pressure tests - 7/16 inch plunger on soft fruit.

Softening temperature - Days to soften at 80°F.

Holding temperature - 50°F.

Flavor - Based on good fruit (score card 80).

Tasters - Soule, Harding, Sunday, Dudak, Melty, Parker, Meckstroth, Melvin, Henry, Williams, Cubbedge.

Method of tasting - Flavor ratings made on large and small fruits.
Numerical ratings based on composite (puree) sample.

Variety	Groves Tested	Lots Tested	Fruit Tested	Sampling Period
Fuchs	1	8	120	6-27 to 7-18-55
Pollocks	1	8	120	6-27 to 7-18-55
Simmonds	1	12	180	6-27 to 8-1-55
Petersen	1	8	120	7-25 to 8-15-55
Pinelli	1	6	90	8-1 to 8-15-55
Trapp	1	6	90	8-1 to 8-15-55
Waldin	1	12	180	8-1 to 9-6-55
Booth 8	1	12	180	8-29 to 10-3-55
Booth 7	1	12	180	9-19 to 10-24-55
Lula	1	12	180	9-26 to 10-31-55
Hickson	1	12	180	9-26 to 10-31-55
Monroe	1	12	180	10-10 to 11-14-55
Booth 1	1	12	180	10-31 to 12-6-55
Taylor	1	12	180	11-1 to 12-5-55
14 varieties	14	144	2160	6-27 to 12-6-55

Fruit determinations: Weight, diameter, length, pressure of flesh, percent oil, total solids, percent glucose, phenolics

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RELATION OF MATURITY TO CERTAIN CHEMICAL AND PHYSICAL CHARACTERS IN FLORIDA AVOCADOS

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The Florida avocado industry is interested in finding more accurate measures of avocado maturity. The objective of the present investigation was to obtain data on physical and chemical characters of Florida avocados which might indicate their maturity. Special consideration was given to the beginning picking dates and the minimum fruit weights specified in the Florida avocado marketing agreement. This work was a continuation of avocado maturity studies reported by Harding (4) and Soule and Harding (9).

MATERIALS AND METHODS

During the 1955-56 season, the following varieties were studied: Fuchs, Pollock, Simmonds, Petersen, Pinelli, Trapp, Waldin, Booth 8, Booth 7, Lula, Hickson, Monroe, Booth 1, and Taylor. Except for the fruit of the Taylor variety, which was obtained from Highlands County, all fruit came from Dade County.

Where possible the first fruit of each variety were picked 3 weeks in advance of the earliest picking date specified in the marketing agreement (2). Test fruit were obtained and analyzed weekly. Each weekly sample consisted of 60 fruit per variety, 30 of which weighed below the minimum set by the marketing agreement and 30 of which met or exceeded the minimum weight requirement. The sub-samples were equally divided, half being sent to Orlando and half being retained at Homestead. Fruit shipped to Orlando were allowed to soften in an 80°F. storage chamber and tests were performed on soft fruit. The Homestead studies were conducted on hard fruit.

Tests for oil content of the fresh fruit were made by the standard California method (8) modified by Harkness (5). Tests for reducing sugars and phenolic compounds were made a few months later on portions of frozen samples of hard fruit which had been stored at -15° to -40° F. The method of determining phenolic compounds was that employed by Guadagni *et al* (3) and that for reducing sugars was one adopted by Sumner (11); both were colorimetric procedures.

In addition, the following tests and measurements were made on the fruit: weight, length, diameter, total soluble solids, firmness of flesh, days to soften at 80° F., loss in weight to ripening, amount of decay and flavor ratings. Flavor was rated by ten members of the Orlando staff on the basis of the characteristics described by Harding (4). The 15 fruit from each group were blended for all chemical tests. Taste tests were made on the blend. No attempt was made to compare palatability ratings of different varieties.

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Results and Discussion

It was impossible to pick the first fruit of every variety 3 weeks in advance of the earliest picking date specified by the marketing agreement because fruit of some varieties large enough to make up the heavier of the two weight groups could not be found. For example, fruit of Fuchs and Trapp weighing 14 ounces, the minimum regulated weight for these varieties, could not be found in the Dade County area at the beginning picking date. At the beginning picking date it was difficult to find Waldin avocados that had reached the minimum specified weight. This difficulty was more prevalent with the summer or West Indian varieties than with the fall or winter ones.

Data for only the three most important commercial varieties, Lula, Booth 8 and Waldin, are presented in table 1. Results for these varieties were similar to those for other varieties. These data were taken before, on and after the beginning picking date in the regulations.

There was no change in the amount of total soluble solids in fruit picked before and after the picking date in the regulations. In some varieties, a statistical "t" test showed that fruit below the minimum weight had significantly less total soluble solids than those above the minimum weight. Although the Booth 8 variety had this significant difference in total soluble solids, no statistical correlation existed between taste and total soluble solids.

The percentage of phenolic compounds in the fruit also did not change consistently with the advance of the season. No statistical correlation existed between the percentage of phenolic compounds in the fruit and the flavor rating of the fruit.

No trend occurred in the percentage of reducing sugars with the advance of season for the approximately six weeks in which the fruit was sampled; however, Church and Chace (1), working with California avocados, and Stahl (10), working with Florida avocados, found that as the season advanced and the fruit became more mature, the percentage of

Table 1.--Soluble solids, phenolic compounds, reducing sugars, oil and flavor of some Florida avocados[1] above and below the minimum weight[2] and before, on and after picking dates as specified in the regulations, 1955.

Variety and picking date	Total solids in fruit		Phenolic compounds in fruit		Reducing sugars in fruit		Oil in fruit		Flavor rating[3] of fruit	
	Below minimum	Above minimum	Below minimum	Above minimum	Below minimum	Above minimum	Below minimum	Above minimum	Below minimum	Above minimum
	%	%	%	%	%	%	%	%		
Waldin:										
Aug. 13[4]	9.3	9.4	4.7	4.5	3.5	3.3	4.9	5.3	65	73
8	9.0	8.9	5.8	5.3	3.5	3.4	4.9	4.6	70	78
15	9.2	9.2	5.7	5.8	3.7	3.7	3.3	3.6	75	85
22	9.1	9.9	4.5	4.7	3.9	4.0	3.3	3.3	70	72
29	9.7	9.7	5.7	4.5	4.2	3.3	4.2	4.2	78	85
Sept. 6	9.7	9.8	4.5	4.5	3.3	3.0	3.9	3.9	81	86
Booth 8:										
Aug. 29	8.3	8.3	8.5	7.7	3.2	3.4	4.2	4.2	60	68
Sept. 6	8.0	8.4	5.0	4.5	2.7	1.5	5.4	5.4	71	78
12[4]	7.9	8.2	6.3	5.8	2.8	3.2	4.6	4.6	74	77
19[4]	7.7	8.4	7.3	6.5	3.0	2.9	4.9	4.9	76	80
26	8.2	8.4	8.7	8.7	2.8	2.9	4.7	5.3	75	75
Oct. 3	8.1	8.6	8.5	7.0	2.8	3.1	5.2	5.2	78	77
Lula:										
Sept. 26	9.5	9.9	6.3	6.5	4.1	4.4	4.3	5.3	76	74
Oct. 3	9.7	9.9	7.7	7.0	4.1	4.4	5.7	4.9	73	75
10	9.9	9.9	7.0	7.0	4.5	4.5	4.5	5.1	75	77
17[4]	10.9	10.9	7.8	7.3	5.0	4.8	4.8	5.8	72	75
24	9.9	10.2	7.0	7.0	4.8	4.5	5.1	4.0	76	76
31	8.2	8.7	7.7	8.5	5.0	4.4	5.2	4.4	74	76

1/ Flavor ratings were made on a blend of 15 soft avocados and other determinations on a blend of 15 hard ones.
2/ Values in the "below minimum" columns represent samples selected below the minimum fruit weight in the regulations; values in the "above minimum" columns represent samples selected above the minimum fruit weight in the regulations.
3/ Ratings below 70 indicate fruit that failed to pass the flavor test, 70-79 palatable fruit, and 80-100 excellent fruit.
4/ On or about the official beginning-picking date on the basis of the 1955-56 regulations. The special early weight and date for the Lula variety in the 1955-57 regulations were not used in this study.

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total sugars decreased. No difference could be found in the percentage of reducing sugars in fruit below and above the minimum weight. There was no statistical correlation between the percentage of reducing sugars and the flavor rating of the fruit.

There were few changes in percentage of oil from week to week and no significant difference in the percentage of oil in fruit picked before the beginning picking date and those picked after the beginning picking date for the period in which this study was undertaken. However, it has long been known that as avocado fruit attain greater maturity they increase in percentage of oil (1, 10). Hatton *et al* (6) showed that selecting Florida avocados for a specific percentage of oil was not practical because of the wide variation in percentages of oil in individual fruit at any given time. In this study there was also no significant difference in the oil content of fruit below the minimum fruit weight and above it. The data indicate that there is no statistical correlation between the percentage of oil and flavor rating of Florida avocados during the first few weeks of the harvest season. However, Hodgkin (7) found a direct relation between percentage of oil and flavor of California avocados.

Fruit above the minimum weight in the regulations had a higher flavor rating than those below it, but correlation of weight and flavor has already been shown by Soule and Harding (9).

In all of the tests described, there were no significant differences between soft and hard fruit. Other physical tests are not shown herein since they agree with previous findings (4, 5, 10).

With data accumulated to date, the present maturity regulations of beginning picking dates and minimum picking weights or diameters are the most satisfactory indices for Florida avocados.

Summary

Samples of 14 varieties of avocados were selected below and above the minimum fruit weight and picking date on the basis of the 1955-56 Florida avocado maturity regulations. Analyses for oil content, reducing sugars, total soluble solids and phenolic compounds showed no appreciable changes for the period in which the samples were studied. The findings indicate that present maturity regulations are still the most satisfactory for Florida avocados.

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PLAINTIFFS' EXHIBIT 26

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RESUMÉ OF PROGRESS OF STUDIES ON FLORIDA AVOCADO MATURITY

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Maturity specifications for the shipment of Florida avocados are based on minimum fruit weights or diameters, and initial release dates for each variety. These specifications permit the larger sizes of each variety to be shipped at designated dates before size restrictions are completely removed on a final release date.

During 1958-59, 1959-60, and 1960-61 approximately 3,500 individual avocados were analyzed for oil content and measured for weight and diameter. These studies included 37 different varieties. Pollock, Waldin, Booth 8, Lula, Taylor, and Booth 1, which are among the principal varieties, were studied during all 3 seasons. The other varieties were studied only during 1959-60.

Biweekly sampling started well in advance of the initial release date and continued until the final release date, which covered a period of about 3 months. The varieties studied during the 1959-60 season were sampled on the beginning and final release dates only. In all cases comparable fruit were allowed to soften at 70° F. to determine palatability. Fruit above minimum consumer acceptability with smooth, mellow, rich, and nutty taste was rated "good."

In general, over the 3-year period, the initial release dates and the date at which the fruit was at minimum consumer acceptability or above were in agreement. Extreme conditions, such as the freeze which occurred in the 1958-59 season, delayed the maturity of the fruit.

fol. 439] West Indian varieties of avocados have low oil content. Pollock, for example, rated "good" and averaged less than 3 percent oil. They ranged from 1.5 to 7.0 percent oil when first rated "good". Hybrid avocados varied with variety as to oil content. The Lula contained 6 percent or less oil when rated "good." Booth 1 contained as much as 10 percent oil when rated "good". Taylor, a Guatemalan variety, averaged about 6 percent oil when rated "good". At any given picking date, there is a wide range in the oil content for each variety for each weight class. For example, Pollock ranged from 2.1 to 4.5 percent, and Booth 1 ranged from 6.0 to 14.0 percent.

Palatability improved and oil content increased as the season progressed, however, for each variety, no consistent relationship appeared to exist between oil content and consumer acceptability at any given date. For most varieties, on initial release dates the fruit of larger weight and diameter appeared to have higher consumer acceptability. Later in the season the divergence seemed to diminish. Present methods of establishing maturity standards on the basis of weights or diameters at specified picking dates are reasonably satisfactory. Standards based on oil content are not practical for Florida avocados because of the high degree of variation between varieties, among individual fruits of a variety, and the year-to-year variation.

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DEFENDANTS' EXHIBIT E

FLORIDA AVOCADOS

1955-1956

ANNUAL REPORT

Variety	Bushels	% of Total Reported
Lula	124237	24.07
Booth 8	85494	16.56
Booth 7 or 7B	68613	13.29
Waldin	50259	9.73
Booth 1	28921	5.60
Pollock and Simmonds	24059	4.66
Hickson	18425	3.57
Booth 3	17093	3.31
Seedlings	16391	3.17
Taylor	15344	2.97
Trapp	13028	2.52
Collinson	11635	2.25
Fuchs	11581	2.24
Tonnage	4514	.87
Monroe	3801	.73
Wagner	3487	.67
Choquette	2368	.45
Linda	2117	.40
Booth 5	1808	.35
Hall	1551	.30
Simpson	1093	.21
Herman	972	.18
Pinelli	906	.18
(Includes 23 varieties and seedlings)	507697	98.28% of Total Amount Received by Handlers.

516103 Total Reported Bushels

[ol. 441]

FLORIDA AVOCADOS

1956-1957
ANNUAL REPORT

Variety	Bushels	% of Total Reported Crop
Lula	145329	33.07
Booth 8	55344	12.59
Booth 7 and 7B	39633	9.01
Waldin	38148	8.68
Taylor	25277	5.75
Collinson	18332	4.17
Booth 1	18298	4.16
Hickson	16485	3.75
Pollock and Simmonds	14959	3.40
Seedlings	13124	2.98
Booth 3	11814	2.68
Trapp	10547	2.40
Tonnage	4509	1.02
Fuchs	3798	.86
Monroe	3344	.76
Hall	3193	.72
Linda	2699	.61
Wagner	2439	.55
Choquette	1852	.42
Herman	863	.19
Booth 5	688	.15
Pinelli	200	.05
(Includes 22 varieties and seedlings)	430875	97.97% of Total Amount Received by Handlers.

439419 Total Reported Bushels.

[fol. 442]

FLORIDA AVOCADOS

1957-1958
ANNUAL REPORT

Variety	Bushels	% of Total Reported
Lula	158752	27.00
Booth 8	129348	22.00
Waldin	60261	10.25
Booth 7 and 7B	54345	9.24
Booth 1	38630	6.57
Hickson	18683	3.17
Pollock and Simmonds	18545	3.15
Seedlings	18211	3.09
Trapp	10763	1.83
Booth 3	8984	1.52
Taylor	8350	1.42
Fuchs	8068	1.37
Collinson	5343	.90
Hall	4517	.76
Booth 5	4481	.76
Choquette	3345	.56
Wagner	2787	.47
Herman	1406	.23
Linda	1154	.19
(Includes 20 varieties and seedlings)	555973	94.48% of Total Amount Received by Handlers

587571 Total Reported Bushels

[fol. 443]

FLORIDA AVOCADOS

1958-1959
ANNUAL REPORT

Variety	Bushels	% of Total Reported Crop
Lula	74679	43.53
Booth 8	22084	12.87
Waldin	12808	7.46
Booth 7	11808	6.88
Seedlings	9099	5.30
Taylor	7719	4.50
Booth 1	5787	3.37
Pollock and Simmonds	3667	2.13
Hickson	3510	2.04
Collinson	3427	1.99
Monroe	1558	.91
Fuchs	1552	.90
Hall	1540	.89
Wagner	1523	.88
Linda	1412	.82
Trapp	1396	.81
Booth 3	1291	.75
Choquette	1207	.70
Ajax B-7-8	999	.58
Tonnage	831	.48
Herman	513	.29
(Includes 21 varieties and seedlings)	168410	98.08% of Total Amount Received by Handlers

171531 Total Reported Bushels

[fol. 444]

FLORIDA AVOCADOS

1959-1960
ANNUAL REPORT

Variety	Bushels	% of Total Reported Crop
Booth 8	92209	27.24
Lula	69726	20.60
Booth 7	43852	12.95
Waldin	30980	9.15
Hickson	15437	4.56
Seedlings	13739	4.05
Booth 1	11243	3.32
Booth 3	8519	2.51
Taylor	6281	1.85
Collinson	3957	1.16
Tonnage	3762	1.11
Monroe	3752	1.10
Hall	3526	1.04
Ajax B-7-8	2929	0.86
Choquette	2602	0.76
Trapp	2574	0.76
Fuchs	2169	0.64
Wagner	1553	0.45
Simmonds	1231	0.36
Booth II	888	0.26
Herman	768	0.22
Simpson	748	0.21
Linda	693	0.20
Booth 5	597	0.17
Hardee	522	0.15
(Includes 24 varieties and seedlings)	324257	95.68% of Total Amount Received by Handlers.

338453 Total Reported Bushels

[fol. 445]

DEFENDANTS' EXHIBIT F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

SUMMONS
SUPERIOR COURT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff

—vs.—

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Defendants

THE PEOPLE OF THE STATE OF CALIFORNIA TO:
FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation.

You are hereby directed to appear and answer the complaint filed in the County of Sacramento in an action entitled as above, brought against you in the Superior Court of the State of California in and for the County of Sacramento, within ten days after the service on you of this summons—if served within said County, or within thirty days if served elsewhere.

You are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Witness my hand and seal of the Superior Court of the State of California, in and for the County of Sacramento this AUG 17 1960.

C. C. LARUE, Clerk, by R. WHIPPLE, Deputy

STANLEY MOSK,
Attorney General of the State of Calif.

JOHN FOURT,
Deputy Attorney General

(SEAL) Attorneys for Plaintiff.

[fol. 446]

STANLEY MOSK, Attorney General
of the State of California
JOHN FOURT, Deputy Attorney General
538 Library and Courts Building
Sacramento 14, California
Telephone: HIckory 5-4711, Ext. 3941

Attorneys for Plaintiff

ENDORSED

Filed AUG 17
C. C. LaRUE,
By R. WHIPPLE,

IN THE SUPERIOR COURT OF THE STATE OF CALIFO
IN AND FOR THE COUNTY OF SACRAMENTO

No. 125826

COMPLAINT FOR DECLARATORY JUDGMENT

PEOPLE OF THE STATE OF CALIFORNIA, Plainti

—vs.—

FLORIDA LIME AND AVOCADO GROWERS, INC., a Flor
poration, and SOUTH FLORIDA GROWERS ASSOCIATI
a Florida corporation, Defendants

Comes now the plaintiff People of the State of C
and alleges:

I

That the defendants Florida Lime and Avocado G
Inc., and South Florida Growers Association, Inc.,
porations chartered by the State of Florida and t
corporations are handlers of avocados grown in
and desire to sell avocados grown in Florida wi
State of California without complying with the pr
of section 792, Agricultural Code.

II

That on November 13, 1957, defendants filed the action "Florida Lime and Avocado Growers, Inc., a Florida [fol. 447] corporation, and South Florida Growers Association, Inc., a Florida corporation, vs. W. C. Jacobsen, Director of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California," in the United States District Court, Northern District of California, Northern Division, No. 7648; that in said action No. 7648 defendants Jacobsen, Knight and Brown have been replaced as parties defendant by William E. Warne, California Director of Agriculture, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California; that the defendants Warne, Brown and Mosk are sued in said action No. 7648 in their official capacities as officers of the State of California; that a copy of the complaint in said action No. 7648 and a copy of each of the orders entered in said action substituting defendants are attached hereto as Exhibits A, B and C, respectively, and are incorporated by reference as though fully set forth at this point; that a copy of the defendants' answers in said action No. 7648 are attached hereto as Exhibits D and E and incorporated by reference as though fully set forth at this point.

III

That a controversy exists between the defendants and the plaintiff hereto, to wit: That defendants herein assert that section 792, Agricultural Code, is unconstitutional under the commerce and equal protection clauses of the United States Constitution and is in conflict with the federal Marketing Agreement Act of 1937; that plaintiff herein asserts that section 792, Agricultural Code, constitutes a valid exercise of the California police power.

[fol. 448]

IV

That the Superior Court for the County of Sacramento, State of California, has jurisdiction of this action and of

the parties under 28 U.S.C. 2284(5) and Article V, sect 21, California Constitution, and section 1060, Code of C Procedure.

V

That an authoritative construction by the Califor courts of section 792, Agricultural Code, in the light of t defendants' allegations of unconstitutionality and of validity would moot or present in a different posture federal constitutional issues raised in said federal District Court action No. 7648.

WHEREFORE, plaintiff prays for judgment declaring th section 792, Agricultural Code, constitutes a valid exer of the state police power as applied to avocados grown California and tendered for sale by said defendants California; and for such other and further relief as m be meet and just in the premises.

STANLEY MOSK, Attorney General
of the State of California
JOHN FOURT, Deputy Attorney Gener

By /s/ JOHN FOURT
Attorneys for Plaintiff

State of California, No. 13668 A
County of Sacramento, ss.:

I, C. C. LaRue, County Clerk of the County of Sac mento, State of California, and ex-officio Clerk of the S perior Court held in and for said County and State afo said, hereby certify that I have compared the foregoi copy with the original instrument on file and of record my office, and that the same is a full, true and correct co of such original, with the endorsements thereon, and the whole thereof.

Attest my hand and seal of said Court this Aug 17 19

C. C. LARUE, County Cle

/By /s/ R. WHIPPLE, Deputy Cle

(Seal)

[fol. 449]

EXHIBIT A

Complaint for injunction entitled "Florida Lime and Avocado Growers v. W. C. Jacobsen, No. 7648" with attached exhibits. (Copy omitted. Printed side folio 1, printed page 1 ante.)

[fol. 473]

EXHIBIT B

Order granting leave to plaintiffs to amend and supplement complaint. (Copy omitted. Printed side folio 524, printed page 523.)

[fol. 475]

EXHIBIT C

Order granting leave to plaintiffs to amend and supplement complaint. (Copy omitted. Printed side folio 522, printed page 522.)

[fol. 477]

EXHIBIT D

Answer of William E. Warne. (Copy omitted. Printed side folio 528, printed page 524.)

[fol. 481]

EXHIBIT E

Answer of Edmund G. Brown and Stanley Mosk. (Copy omitted. Printed side folio 532, printed page 527.)

[fol. 485]

EXHIBIT P

	Date	To	Flats	Boxes	Return and Lot #	Amount	Average	Invoice NO
1	10-29054	Oakland		✓650✓	52	2612.81	4.5[illegible]	18386
2	11-9-54	San Diego		✓300 No Trans.	2883	1018.32	$ 3.96	18494
3	11-10-54	Oakland		✓650 No Trans	62	2716.56	4.75	18499
4	11-11-54	Los Angeles		✓650	2332 *	2212.66	4.14	18508
5	11-11-54	Los Angeles		✓615 650 No Trans	22331	2562.61	4.57	18509
6	11-12-54	Los Angeles		✓650	2335 *	2462.98	4.43 / 3.90	18517
7	11-10-54	Los Angeles	✓359	✓449	2330 *	2103.79	Flat 8.5✓ Box 3.66	18500
8	11-12-54	Los Angeles		✓650 No Trans	2336	2415.27	4.55	18518
9	11-13-54	Oakland		✓450 No Trans	66	1788.46	4.52	185.28
10	11-13-54	San Francisco		✓200	66	794.87	4.52	18529
11	11-15-54	Oakland		✓650 No Trans	68	2693.59	4.71	18544
12	11-16-54	San Diego	✓500	No Trans	2894	660.00	2.50	18565
13	11-18-54	Los Angeles		✓650	2342 *	1882.43	2.97	18581
14	11-19-54	Los Angeles		✓650 No Trans	2343	1409.47	2.66	18594

CALIFORNIA AVOCADO SHIPMENTS 1956/57 SEASON

	TRUCK NO	INVOICE NO	PLATS		
11-16-56	551	21400	1600		
11-16	554	21401	1550		
11-17	556	21406	1574		
11-21	560	21415	1600		
11-21	561	21416	1600		
11-23	563	8628 8629	1600		
11-23	564	8630	1600		
11-24	570	8640-41	1600		
11-26	573	8671 8672	1600		
11-27	575	8673-74	1600		
11-27	578	8676 77	1600		
11-29	579	21438	1600		
12-1	589	21451	1600		
12-3	592	8711	1600		
12-4	595	8717	1600		
12-4	596	8723	1600		
12-5	598	21462	1600		
12-5	599	8724-25	1600		
12-6	601	21464	1600		
12-6	603	21489	1600		
12-7	606	8738	1600		
12-8	608	8740	1600		
12-8	609	21471	1600		
12-13	618	21497	1320 280		
12-15	623	21516	1600		
12-15	627	8788	1600		
12-15	628	8789	1600		
12-18	630	21499	1403		
12-20	638	21506	1600		
12-21	639	8858-59	1600		
1-4-57	4	21533	1575		
1-8	11	21544	1600		
1-15	21	21559	1600		
1-17	24	21562	1600		
	346		54100		
11-7	563	22415	1823	166	
11	573	22432	1938	177	
14	576	22436	1760	188	
15	579	22441	1793	147	
12-7	628	22516	1700	160	

California Alvarado Shipments

1955 - 56 season

	Truck	Invoice	Fla	Grade Select Tan	Box	Grade Select All
11/15/55	624	20476	–		675	500 –
"16	524	20536	–		675	497 –
"23	551	20565	–		675	472 –
"25	597 –	20314	1700	185	–	
"29	598 ✓	20334	1684	185	–	
12/10	608 ✓	20347	1684	185	–	
"13	620 ✓	20360	1674	185	–	
"14	623 ✓	20364	1667	185	–	
"15	624 ✓	20373	1600	185	–	
"16	635 –	20387	1575	185	–	
"21	649 –	20416	1657	185	–	
"22	659 –	20422	1660	185	–	
"30	680 ✓	20459	1660	185	–	
	683 ✓	20454	1645	185	–	
1/4/56	2 –	20470	1650	185	–	
1/9	37 –	20527	360	231	–	
1/10	40 –	20536	1650	225	–	
11/16/55	528	20335	±	*	677	488
11/18	541	20348			775	521
"18	540	20545			650	497
"22	546	20565	–		675	485
"23	554	20566	–		675	433

[fol. 487]

DEFENDANTS' EXHIBIT R

	18	12.3	19.8	3.2	3.7	8.7	8.2	6.2	5.6	4.5	4.4
	25	13.8	19.2	3.3	3.7	8.2	8.3	5.9	5.6	4.2	4.4
	Aug. 1	13.3	17.8	3.3	3.6	10.1	9.2	5.9	5.0	4.5	4.2
[redacted]	July 25	9.0	13.8	2.9	3.5	9.4	9.4	5.5	5.3	3.5	3.3
	Aug. 1	8.5	13.6	2.9	3.4	8.9	9.5	5.3	5.0	3.4	3.7
	8	10.0	12.8	3.0	3.3	8.9	8.9	4.5	5.3	3.2	3.0
	15	9.5	12.4	3.0	3.3	8.3	8.5	5.5	5.3	3.4	3.4
Pinelli	Aug. 1	13.9	18.8	3.4	3.7	8.9	8.9	5.8	5.8	3.9	3.4
	8	15.3	19.5	3.5	3.8	8.2	8.9	6.5	6.7	3.7	3.7
	15	15.0	20.2	3.5	3.9	8.3	8.7	7.6	7.3	3.8	4.0
Trapp	Aug. 1	12.3	14.1	3.4	3.6	8.9	8.9	5.5	4.0	3.8	3.6
	8	12.7	14.3	3.4	3.5	8.3	8.3	5.2	5.0	3.9	3.9
	15	12.3	14.3	3.4	3.6	9.4	9.0	5.5	4.0	4.0	4.0
Waldin	Aug. 1	14.2	16.4	3.3	3.4	9.3	9.4	4.7	4.5	3.5	3.3
	8	14.2	17.1	3.4	3.5	9.0	8.9	5.8	5.3	3.5	3.4
	15	13.4	17.1	3.3	3.5	9.2	9.2	5.7	5.8	3.7	3.7
	22	13.6	16.8	3.4	3.5	9.1	9.9	4.5	4.7	3.9	4.0
	29	14.3	17.3	3.4	3.6	9.7	9.7	5.7	4.5	4.2	3.3
	Sept. 6	13.0	17.9	3.3	3.6	9.7	9.8	4.5	4.5	3.3	3.8

1/ Each figure represents an average of 15 avocados tested at Homestead, Florida.
2/ Each figure represents an average of 15 avocados tested at Orlando, Florida.
3/ Number of days at 80°F. does not include rail transit time of 2 or 3 days from Homestead, Florida to Orlando, Florida.

Confidential, not to be quoted or copied.

Some Physical and Chemical Changes in the Principal Varieties of Florida Avocados Picked Below and Above the Regulated Mini

by T. T. Hatton, Jr., John Popenoe, Mortimer J. Soule, Jr., and Paul L. Harding

HARD FRUIT1/

Variety	Date Picked	Average Weight of Fruit		Average Diameter of Fruit		Total Soluble Solids		Phenolic Compounds		Reducing Sugars		Oil	
		Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
		Ounces		Inches		Percent		Percent		Percent		Percent	
Ca's	June 27	10.2	14.3	2.8	3.2	6.9	6.9	5.7	5.7	3.5	3.3	3.6	2.7
	July 5	10.6	15.2	2.8	3.1	7.3	7.3	4.8	5.2	3.4	3.5	3.1	3.6
	11	11.3	15.4	2.9	3.3	7.1	6.9	5.2	5.0	3.5	3.2	3.4	3.1
	18	11.7	16.8	2.9	3.3	7.4	6.9	5.2	5.5	3.3	3.1	5.7	5.1
Pollock	June 27	13.6	16.7	3.1	3.2	7.4	7.4	3.3	1.5	4.4	4.8	2.4	1.8
	July 5	12.0	17.6	3.0	3.3	7.9	7.9	3.0	3.0	5.0	5.3	1.9	3.1
	11	11.8	22.4	3.0	3.6	7.4	7.4	3.8	2.3	4.8	4.4	2.5	2.6
	18	11.6	22.7	3.0	3.7	7.8	7.8	2.5	2.8	4.6	4.6	3.1	3.1
Amonds	June 27	14.0	17.3	3.1	3.3	8.0	8.9	5.9	5.5	4.5	4.8	1.9	2.7
	July 5	11.5	16.6	3.0	3.3	8.4	7.8	5.9	5.6	4.8	3.9	2.2	2.5
	11	12.9	18.1	3.1	3.5	7.5	8.1	5.9	5.5	4.2	4.4	3.0	3.0
	18	12.3	19.8	3.2	3.7	8.7	8.2	6.2	5.6	4.5	4.4	3.0	3.0
	25	13.8	19.2	3.3	3.7	8.2	8.3	5.9	5.6	4.2	4.4	3.7	4.2
	Aug. 1	13.3	17.8	3.3	3.6	10.1	9.2	5.9	5.0	4.5	4.2	3.7	3.2
Peterson	July 25	9.0	13.8	2.9	3.5	9.4	9.4	5.5	5.3	3.5	3.3	4.2	4.6
	Aug. 1	8.5	13.6	2.9	3.4	8.9	9.5	5.3	5.0	3.4	3.7	4.5	5.1
	8	10.0	12.8	3.0	3.3	8.9	8.9	4.5	5.3	3.2	3.0	4.0	4.0
	15	9.5	12.4	3.0	3.3	8.3	8.5	5.5	5.3	3.4	3.4	4.0	4.5
Pinelli	Aug. 1	13.9	18.8	3.4	3.7	8.9	8.9	5.8	5.8	3.9	3.4	4.2	4.7
						8.2	8.9	6.5	6.7	3.7	3.7	3.5	3.6

arieties of Florida Avocados Picked Below and Above the Regulated Minimum Weight, 1955-56. [fol. 435]

John Popenoe, Mortimer J. Soule, Jr., and Paul L. Harding

1/								SOFT FRUIT 2/									
Solids		Phenolic Compounds		Reducing Sugars		Oil		Average Weight on Arrival		Softening Period at 80°F. 3/		Flavor	
Above		Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
t		Percent		Percent		Percent		Ounces		Days		Numerical Rating	
6.9		5.7	5.7	3.5	3.3	3.6	2.7	11.6	15.2	4	3	65	68
7.3		4.8	5.2	3.4	3.5	3.1	3.6	11.2	16.5	4	4	73	78
6.9		5.2	5.0	3.5	3.2	3.4	3.1	12.3	16.6	2	2	75	80
6.9		5.2	5.5	3.3	3.1	5.7	5.1	11.5	17.4	2	2	80	85
7.4		3.3	1.5	4.4	4.8	2.4	1.8	12.7	17.5	6	6	65	69
7.9		3.0	3.0	5.0	5.3	1.9	3.1	13.7	20.1	5	5	73	75
7.4		3.8	2.3	4.8	4.4	2.5	2.6	13.7	21.6	4	4	75	77
7.8		2.5	2.8	4.6	4.6	3.1	3.1	13.6	17.8	3	3	80	85
8.9		5.9	5.5	4.5	4.8	1.9	2.7	13.7	17.4	7	7	65	69
7.8		5.9	5.6	4.8	3.9	2.2	2.5	13.7	19.4	5	5	73	77
8.1		5.9	5.5	4.2	4.4	3.0	3.0	13.6	17.8	3	3	75	78
8.2		6.2	5.6	4.5	4.4	3.0	3.0	13.9	19.0	3	3	78	83
8.3		5.9	5.6	4.2	4.4	3.7	4.2	14.0	18.6	4	4	75	80
9.2		5.9	5.0	4.5	4.2	3.7	3.2	13.0	19.9	3	2	78	87
9.4		5.5	5.3	3.5	3.3	4.2	4.6	9.3	13.5	4	4	60	65
9.5		5.3	5.0	3.4	3.7	4.5	5.1	8.4	14.6	4	4	75	82
8.9		4.5	5.3	3.2	3.0	4.0	4.0	10.1	14.0	5	4	80	85
8.5		5.5	5.3	3.4	3.4	4.0	4.5	10.6	13.5	6	5	73	85
8.9		5.8	5.8	3.9	3.4	4.2	4.7	14.7	19.1	5	5	60	65

HARD FRUIT 1/

Variety	Date Picked	Average Weight of Fruit		Average Diameter of Fruit		Total Soluble Solids		Phenolic Compounds		Reducing Sugars		Oil	
		Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
		Ounces		Inches		Percent		Percent		Percent		Percent	
Booth 8	Aug. 29	11.6	14.5	3.1	3.3	8.3	8.3	8.5	7.7	3.2	3.4	4.2	4.2
	Sept. 6	11.2	16.7	3.0	3.5	8.0	8.4	5.0	4.5	2.7	1.5	5.4	5.4
	12	11.1	15.4	3.1	3.4	7.9	8.2	6.3	5.8	2.8	3.2	4.6	4.6
	19	10.3	16.9	3.0	3.5	7.7	8.4	7.3	6.5	3.0	2.9	4.9	4.9
	26	11.7	15.2	3.1	3.4	8.2	8.4	8.7	8.7	2.8	2.9	4.7	5.3
	Oct. 3	10.3	16.1	3.0	3.5	8.1	8.6	8.5	7.0	2.8	3.1	5.2	5.2
Booth 7	Sept. 19	11.0	17.7	3.2	3.7	8.9	9.7	8.3	7.3	3.3	2.7	3.5	4.2
	26	12.9	16.8	3.3	3.7	9.0	9.5	7.8	7.8	3.1	2.7	3.8	4.6
	Oct. 3	13.0	17.3	3.4	3.7	9.6	10.9	7.7	7.0	2.5	2.7	5.2	4.0
	10	11.6	16.9	3.2	3.6	10.2	11.2	7.3	7.3	2.3	2.4	4.4	4.6
	17	13.3	17.8	3.4	3.8	---	---	7.3	7.3	2.4	2.9	4.2	4.7
	24	13.6	17.9	3.4	3.8	11.5	12.1	8.3	7.3	2.5	2.8	5.2	6.9
Lula 4/	Sept. 26	14.3	16.4	3.3	3.4	9.5	9.9	6.3	6.9	4.1	4.4	4.3	5.3
	Oct. 3	14.0	16.8	3.3	3.5	9.7	9.9	7.7	7.0	4.1	4.4	5.7	6.9
	10	14.2	16.6	3.3	3.5	9.9	9.9	7.0	7.0	4.5	4.5	6.5	5.1
	17	13.2	18.0	3.2	3.7	10.9	10.9	7.8	7.3	5.0	4.8	4.8	5.6
	24	14.1	17.2	3.3	3.5	9.9	10.2	7.0	7.0	4.8	4.5	5.1	6.0
	31	12.7	17.9	3.2	3.6	8.2	8.7	7.7	8.5	5.0	4.4	5.2	6.4
Hickson	Sept. 26	11.3	16.1	2.9	3.3	8.8	8.8	9.9	9.1	---	3.6	5.8	5.3
	Oct. 3	10.7	16.9	3.0	3.4	8.5	8.5	8.3	8.5	3.1	3.0	6.2	6.6
	10	10.5	14.5	2.9	3.2	9.0	8.9	8.7	9.9	3.2	3.9	7.2	5.6

	10	11.6	16.9	3.2	3.6	10.2	11.2	7.3	7.3	2.3	2.4
	17	13.3	17.8	3.4	3.8	---	---	7.3	7.3	2.4	2.9
	24	13.6	17.9	3.4	3.8	11.5	12.1	8.3	7.3	2.5	2.8
Lula 4/	Sept. 26	14.3	16.4	3.3	3.4	9.5	9.9	6.3	6.5	4.1	4.4
	Oct. 3	14.0	16.8	3.3	3.5	9.7	9.9	7.7	7.0	4.1	4.4
	10	14.2	16.6	3.3	3.5	9.9	9.9	7.0	7.0	4.5	4.5
	17	13.2	18.0	3.2	3.7	10.9	10.9	7.8	7.3	5.0	4.8
	24	14.1	17.2	3.3	3.5	9.9	10.2	7.0	7.0	4.8	4.5
	31	12.7	17.9	3.2	3.6	8.2	8.7	7.7	8.5	5.0	4.4
Hickson	Sept. 26	11.3	16.1	2.9	3.3	8.8	8.8	9.9	9.1	---	3.6
	Oct. 3	10.7	16.9	3.0	3.4	8.5	8.5	8.3	8.5	3.1	3.0
	10	10.5	14.5	2.9	3.2	9.0	8.9	8.7	9.9	3.2	3.9
	17	8.6	15.5	2.7	3.3	9.0	8.9	9.3	9.1	2.6	2.9
	24	11.2	17.5	2.9	3.4	8.8	8.8	10.7	9.6	3.2	3.0
	31	11.9	15.3	3.0	3.3	7.8	7.8	9.1	7.8	3.3	3.6
Monroe	Oct. 10	21.6	28.1	3.8	4.2	9.2	9.2	---	---	---	---
	17	21.0	26.0	3.9	4.0	9.4	9.4	---	---	---	---
	24	19.9	27.3	3.8	4.2	9.6	9.5	---	---	---	---
	31	20.4	25.3	3.8	4.0	8.0	7.9	---	---	---	---
	Nov. 7	20.4	25.6	3.8	4.0	8.2	8.9	---	---	---	---
	14	20.3	27.5	3.8	4.2	8.9	8.8	---	---	---	---

1/ Each figure represents an average of 15 avocados tested at Homestead, Florida.
2/ Each figure represents an average of 15 avocados tested at Orlando, Florida.
3/ Number of days at 80° F. does not include rail transit time of 2 or 3 days from Homestead, Florida to Orlando, Florida.
4/ Special early weight and date were not used.

HARD FRUIT 1/									SOFT FRUIT 2/					
Fruit	Total Soluble Solids		Phenolic Compounds		Reducing Sugars		Oil		Average Weight on Arrival		Softening Period at 80°F. 3/		Flavor	
	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
	Percent		Percent		Percent		Percent		Ounces		Days		Numerical Rating	
	8.3	8.3	8.5	7.7	3.2	3.4	4.2	4.2	11.7	15.6	8	8	60	68
	8.0	8.4	5.0	4.5	2.7	1.5	5.4	5.4	11.3	16.4	7	7	71	78
	7.9	8.2	6.3	5.8	2.8	3.2	4.6	4.6	10.8	16.7	7	8	74	79
	7.7	8.4	7.3	6.5	3.0	2.9	4.9	4.9	10.9	15.8	8	8	76	80
	8.2	8.4	8.7	8.7	2.8	2.9	4.7	5.3	10.9	15.5	8	8	75	76
	8.1	8.6	8.5	7.0	2.8	3.1	5.2	5.2	11.3	15.9	7	7	78	77
	8.9	9.7	8.3	7.3	3.3	2.7	3.5	4.2	13.0	19.3	7	8	77	76
	9.0	9.5	7.8	7.8	3.1	2.7	3.8	4.6	11.9	17.7	7	6	78	79
	9.6	10.9	7.7	7.0	2.5	2.7	5.2	4.0	11.6	19.0	7	7	76	79
	10.2	11.2	7.3	7.3	2.3	2.4	4.4	4.6	12.1	19.7	6	7	78	79
	---	---	7.3	7.3	2.4	2.9	4.2	4.7	13.4	18.7	7	7	81	84
	11.5	12.1	8.3	7.3	2.5	2.8	5.2	6.9	12.0	18.8	8	8	77	81
	9.5	9.9	6.3	6.5	4.1	4.4	4.3	5.3	14.3	17.3	8	8	76	74
	9.7	9.9	7.7	7.0	4.1	4.4	5.7	6.9	12.6	17.8	7	6	73	75
	9.9	9.9	7.0	7.0	4.5	4.5	6.5	5.1	12.5	17.7	8	8	75	77
	10.9	10.9	7.8	7.3	5.0	4.8	4.8	5.6	11.9	17.8	8	8	72	75
	9.9	10.2	7.0	7.0	4.8	4.5	5.1	6.0	13.4	17.4	8	8	76	76
	8.2	8.7	7.7	8.5	5.0	4.4	5.2	6.4	13.8	17.3	8	8	74	76
	8.8	8.8	9.9	9.1	---	3.6	5.8	5.3	12.1	18.2	9	7	75	77
	8.5	8.5	8.3	8.5	3.1	3.0	6.2	6.6	10.7	16.1	6	6	71	72
	9.0	8.9	8.7	9.9	3.2	3.9	7.2	5.6	9.7	16.1	7	6	72	73
	8.8	8.8	9.3	9.1	2.6	2.9	5.4	6.1	9.9	17.6	6	6	72	75

7.3	7.3	:	2.4	2.9	:	4.2	4.7	:	13.4	18.7	:	7	7	: 81 84
8.3	7.3	:	2.5	2.8	:	5.2	6.9	:	12.0	18.8	:	8	8	: 77 81
6.3	6.5	:	4.1	4.4	:	4.3	5.3	:	14.3	17.3	:	8	8	: 76 74
7.7	7.0	:	4.1	4.4	:	5.7	6.9	:	12.6	17.8	:	7	6	: 73 75
7.0	7.0	:	4.5	4.5	:	6.5	5.1	:	12.5	17.7	:	8	8	: 75 77
7.8	7.3	:	5.0	4.8	:	4.8	5.6	:	11.9	17.8	:	8	8	: 72 75
7.0	7.0	:	4.8	4.5	:	5.1	6.0	:	13.4	17.4	:	8	8	: 76 76
7.7	8.5	:	5.0	4.4	:	5.2	6.4	:	13.8	17.3	:	8	8	: 74 76
9.9	9.1	:	---	3.6	:	5.8	5.3	:	12.1	18.2	:	9	7	: 75 77
8.3	8.5	:	3.1	3.0	:	6.2	6.6	:	10.7	16.1	:	6	6	: 71 72
8.7	9.9	:	3.2	3.9	:	7.2	5.6	:	9.7	16.1	:	7	6	: 72 73
9.3	9.1	:	2.6	2.9	:	5.4	6.1	:	9.9	17.6	:	6	6	: 72 75
10.7	9.6	:	3.2	3.0	:	6.0	6.1	:	10.5	16.8	:	6	6	: 68 69
9.1	7.8	:	3.3	3.6	:	7.4	7.4	:	11.5	16.5	:	6	6	: 69 69
---	---	:	---	---	:	4.0	4.6	:	18.3	27.5	:	6	7	: 73 75
---	---	:	---	---	:	3.0	3.8	:	18.9	32.0	:	7	7	: 71 73
---	---	:	---	---	:	3.8	4.2	:	18.8	31.5	:	8	7	: 71 72
---	---	:	---	---	:	4.6	4.7	:	20.0	27.5	:	7	7	: 72 72
---	---	:	---	---	:	4.3	4.8	:	20.9	28.3	:	7	7	: 76 79
---	---	:	---	---	:	5.0	4.8	:	20.6	30.9	:	6	5	: 79 82

rida to Orlando, Florida.

HARD FRUIT 1/

Variety	Date Picked	Average Weight of Fruit		Average Diameter of Fruit		Total Soluble Solids		Phenolic Compounds		Reducing Sugars		Oil	
		Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
		Ounces		Inches		Percent		Percent		Percent		Percent	
Booth 1	Oct. 31	12.3	---	3.4	---	----	---	6.5	---	3.1	---	---	---
	Nov. 7	11.7	17.9	3.3	3.9	8.8	8.2	8.3	7.7	4.1	3.2	6.0	9.2
	14	13.1	17.4	3.5	3.8	8.1	8.4	7.3	7.0	3.5	3.3	6.6	8.2
	21	12.1	17.4	3.3	3.8	8.1	7.9	8.3	7.0	4.1	3.4	6.7	7.1
	29	11.7	19.4	3.4	4.0	8.4	8.7	8.3	7.0	3.8	2.8	6.9	10.0
	Dec. 6	12.3	18.6	3.5	4.0	7.8	7.8	7.7	8.3	3.4	2.8	9.2	10.3
Taylor	Nov. 1	10.0	11.8	2.9	3.1	8.4	8.3	10.3	9.9	4.8	5.0	6.0	6.0
	8	10.4	12.1	2.9	3.0	8.1	7.9	11.6	13.1	4.8	4.8	5.4	5.4
	15	9.8	12.1	2.9	3.0	8.3	8.3	16.0	13.3	4.8	5.1	6.0	6.2
	22	10.2	12.4	2.9	3.1	8.4	8.4	9.3	17.0	5.3	5.1	6.4	7.3
	28	9.9	12.2	2.9	3.2	9.0	8.8	13.1	14.6	5.3	4.5	7.4	7.8
	Dec. 5	9.7	12.1	3.0	3.1	8.0	7.9	15.0	13.6	4.8	4.5	7.5	7.6

1/ Each figure represents an average of 15 avocados tested at Homestead, Florida.
2/ Each figure represents an average of 15 avocados tested at Orlando, Florida.
3/ Number of days at 80° F. does not include rail transit time of 2 or 3 days from Homestead, Florida to Orlando, Florida.

Fruit 1/	Total Soluble Solids		Phenolic Compounds		Reducing Sugars		Oil		SOFT FRUIT 2/ Average Weight on Arrival		Softening Period at 80°F. 3/		Flavor	
	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above	Below	Above
	Percent		Percent		Percent		Percent		Ounces		Days		Numerical Rating	
	----	---	6.5	---	3.1	---	---	---	12.9	---	8	--	64	---
	8.8	8.2	8.3	7.7	4.1	3.2	6.0	9.2	12.6	19.3	9	8	72	74
	8.1	8.4	7.3	7.0	3.5	3.3	6.6	8.2	12.7	20.0	8	8	72	72
	8.1	7.9	8.3	7.0	4.1	3.4	6.7	7.1	11.9	21.9	9	8	76	82
	8.4	8.7	8.3	7.0	3.8	2.8	6.9	10.0	13.3	20.6	10	9	75	80
	7.8	7.8	7.7	8.3	3.4	2.8	9.2	10.3	12.5	19.9	7	7	72	74
	8.4	8.3	10.3	9.9	4.8	5.0	6.0	6.0	10.7	12.6	8	8	69	71
	8.1	7.9	11.6	13.1	4.8	4.8	5.4	5.4	10.7	13.0	8	8	78	79
	8.3	8.3	16.0	13.3	4.8	5.1	6.0	6.2	10.8	13.0	7	7	76	76
	8.4	8.4	9.3	17.0	5.3	5.1	6.4	7.3	10.8	13.3	8	7	81	84
	9.0	8.8	13.1	14.6	5.3	4.5	7.4	7.8	9.5	13.4	10	9	82	86
	8.0	7.9	15.0	13.6	4.8	4.5	7.5	7.6	11.1	13.0	8	8	81	82

tead, Florida.
do, Florida.
or 3 days from Homestead, Florida to Orlando, Florida.

[fol. 488]

DEFENDANTS' EXHIBIT S

FLORIDA LIME AND AVOCADO GROWERS, INC.
AVOCADOS SHIPPED TO CALIFORNIA

1954-55 season	No. of Lugs*
10-18	2200
10-19	2100
10-19	2200
10-20	2200
10-21	2200
10-23	2200
10-26	2200
10-26	2200
10-26	1800
10-27	1900
10-28	2200
10-29	2200
11-2	2200
11-3	2200
11-5	2200
11-5	2000
11-5	2000
11-9	2200
11-10	2200
11-11	2208
11-11	2200
11-12	2100
11-12	2200
11-12	1000
11-16	1600
11-16	1200
11-16	2200
11-17	2200
11-18	1300
11-19	2200
	63,208 lugs

* Lug used in 1954-55 season contained 11 pounds of fruit; 5 lugs per bushel.

In 1955-56 and subsequent seasons, lug used contained 13½ to 15 pounds of fruit; approximately 3½ lugs per bushel.

[fol. 489]

1955-56

Date	No. of Lugs
11-5	1913
11-8	1950
11-8	1914
11-9	1914
11-9	2000
11-10	1929
11-10	1915
11-11	1915
11-11	1900
11-12	2083
11-12	2045
11-12	1900
11-14	2208
11-15	2096
11-16	2000
12-1	1900
12-3	2000
56-1-4	2000
	35,480

[fol. 490]

1956-57

Date	No. of Lugs
56-12-28	1805
12-14	1850
12-6	2004
12-12	2000
57-1-9	1909
1-16	400
1-16	1425
1-25	2026
	13,419 Lugs

8.9	5.9	5.5	4.5	4.8	1.9	2.7	13.7	17.4	7	7	65	69
7.8	5.9	5.6	4.8	3.9	2.2	2.5	13.7	19.4	5	5	73	77
8.1	5.9	5.5	4.2	4.4	3.0	3.0	13.6	17.8	3	3	75	78
8.2	6.2	5.6	4.5	4.4	3.0	3.0	13.9	19.0	3	3	78	83
8.3	5.9	5.6	4.2	4.4	3.7	4.2	14.0	18.6	4	4	75	80
9.2	5.9	5.0	4.5	4.2	3.7	3.2	13.0	19.9	3	2	78	87
9.4	5.5	5.3	3.5	3.3	4.2	4.6	9.3	13.5	4	4	60	65
9.5	5.3	5.0	3.4	3.7	4.5	5.1	8.4	14.6	4	4	75	82
8.9	4.5	5.3	3.2	3.0	4.0	4.0	10.1	14.0	5	4	80	85
8.5	5.5	5.3	3.4	3.4	4.0	4.5	10.6	13.5	6	5	73	85
8.9	5.8	5.8	3.9	3.4	4.2	4.7	14.7	19.1	5	5	60	65
8.9	6.5	6.7	3.7	3.7	3.5	3.6	15.1	19.7	5	5	72	78
8.7	7.6	7.3	3.8	4.0	3.8	4.1	15.1	21.2	7	7	72	80
8.9	5.5	4.0	3.8	3.6	2.9	2.9	12.2	14.3	3	3	72	78
8.3	5.2	5.0	3.9	3.9	3.0	3.0	12.7	14.8	7	6	72	78
9.0	5.5	4.0	4.0	4.0	2.3	2.0	12.1	14.9	6	7	80	80
9.4	4.7	4.5	3.5	3.3	4.9	5.3	14.6	17.3	5	5	65	73
8.9	5.8	5.3	3.5	3.4	4.9	4.6	13.4	17.4	6	6	70	78
9.2	5.7	5.8	3.7	3.7	3.3	3.6	13.8	18.0	6	6	75	85
9.9	4.5	4.7	3.9	4.0	3.3	3.3	14.2	17.4	7	7	70	72
9.7	5.7	4.5	4.2	3.3	4.2	4.2	13.9	18.7	7	6	78	85
9.8	4.5	4.5	3.3	3.8	3.9	3.9	13.8	18.4	5	5	81	86

stead, Florida to Orlando, Florida.

1957-58 Date	No. of Lugs
11-14	900
11-14	974
11-18	678
12-9	2043
12-12	2035
12-13	1795
12-17	760
12-20	786
	9,971 Lugs

[fol. 491]

SUPREME COURT OF THE UNITED STATES

No. 49, October Term, 1959

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Appellants.

vs.

JACOBSEN, Director of the Department of Agriculture of the State of California, et al.

JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES —Filed April 25, 1960

Appeal From the United States District Court for the Northern District of California.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Northern District of California for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that the said appellants, Florida Lime and Avocado Growers, Inc., et al. recover from Jacobsen, Director of the Department of Agriculture of the State of California, et al. Two Thousand Three Hundred Fifty Dollars and Seventy Cents ($2350.70) for their costs herein expended.

March 7, 1960

Clerk's costs	$ 519.60
Printing record	1831.10
Total	$2350.70

Mr. Justice Douglas joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

Dissenting opinion by Mr. Justice Frankfurter with whom Mr. Justice Douglas joins.

A true copy James R. Browning, Test: Clerk of the Supreme Court of the United States, Certified this twentieth day of April, 1960, By R. J. Blanchard, Deputy.

[fol. 492] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

NOTICE OF MOTIONS BY PLAINTIFFS: (1) TO AMEND AND SUPPLEMENT COMPLAINT; (2) TO RECONSIDER AND GRANT MOTION MADE FEBRUARY 2, 1959; (3) TO SET CASE FOR TRIAL—Filed April 29, 1960

To Stanley Mosk and John Fourt, attorneys for defendants, and to William E. Warne, Director of the Department of Agriculture of California:

Please take notice that on Monday, May 9, 1960, at 2:0 o'clock P.M., or at such other time as the court may direct the plaintiffs in the above-entitled action will move the court: (1) for leave to amend and supplement their complaint by substituting William E. Warne, present Director of the Department of Agriculture of California, as party defendant in place of his predecessor in said office, W. C. Jacobsen; (2) to reconsider and grant the motion to amend their complaint filed herein by plaintiffs on February 2 1959; (3) to pass upon the motion filed herein by plaintiffs February 28, 1958 to set the case for trial at the early convenience of the court.

Isaac E. Ferguson, Attorney for plaintiffs.

April 28, 1960

[fol. 493] IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

MOTION OF PLAINTIFFS TO AMEND AND SUPPLEMENT COMPLAINT BY SUBSTITUTING WILLIAM E. WARNE, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, AS DEFENDANT IN PLACE OF W. C. JACOBSEN —Filed April 29, 1960

The plaintiffs, Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc., by their undersigned attorney, move the court to grant leave to amend and supplement the complaint by substituting William E. Warne, present Director of the Department of Agriculture of California, as party defendant in place of W. C. Jacobsen, his predecessor in said office, without prejudice to the prior proceedings in this action.

In support of this motion, plaintiffs state as follows:

1. This motion is made pursuant to Rules 15 and 25(d) of the Rules of Civil Procedure for the United States District Courts.

2. Said W. C. Jacobsen was named as a party defendant in plaintiff's complaint as Director of the Department of Agriculture of the State of California and it is alleged in the complaint that as such executive officer of the state he [fol. 494] was granted the authority to conduct the state government's Department of Agriculture and to enforce the provisions of the Agricultural Code of California, in particular section 792 thereof, alleged by plaintiffs to contravene the provisions of the Constitution of the United States referred to in paragraph III of the complaint, also further alleged to be in conflict with an act of Congress regulating interstate commerce (paragraph IV of complaint).

3. On January 4, 1960 said W. C. Jacobsen ceased to hold office as Director of the Department of Agriculture and William E. Warne, having been duly appointed to said office, assumed office as such director and still continues to hold this office.

4. There is substantial need for continuing this action against William E. Warne, as present Director of the Department of Agriculture of California, because he is now the officer of the state directly and primarily charged with authority to continue to enforce the provisions of the Agricultural Code of California, in particular the provisions whereby plaintiffs are precluded from marketing in this state Florida-grown avocados with less than 8% oil content, of which provisions plaintiffs complain as aforesaid. Section 792 of said Code, containing the 8% oil content requirement, has been enforced at all times since its enactment by the predecessors of the present director of California's Department of Agriculture and is now being enforced by the present director, and plaintiffs allege that said statute will continue to be enforced against them by the present director as long as it remains in force unless deterred by judicial declaration or writ of injunction as prayed for in plaintiff's complaint.

5. The Supreme Court of the United States has adjudged that plaintiff's complaint sets forth a cause of action triable by this court under sections 1331 and 1337 of the Judicial Code.

[fol. 495] Wherefore plaintiffs pray that the court may enter an order granting leave to amend their complaint by substituting William E. Warne, present Director of the Department of Agriculture of the State of California, as party defendant in place of W. C. Jacobsen, his predecessor in said office, all proceedings in the case to stand as if said William E. Warne had originally been named as defendant and all pleadings and motions heretofore made herein by the defendant W. C. Jacobsen, former Director of the Department of Agriculture of the State of California, to be regarded as if made by William E. Warne, present Director of the Department of Agriculture of the State of California.

Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, Attorneys for plaintiffs.

[fol. 496]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I.

When litigation involves an assertion of right, or exercise of a continuing duty or power by a party in his representative capacity as a public officer, and the term of office of such party comes to an end, substitution of his successor in office is matter of course.

Estate of Lermond, 142 Cal. 585.
Weadon v. *Shahen*, 50 C.A. 2d 254, 259-260.

In the federal practice, provision for such substitution of parties is made by Rule 25(d) of Rules of Civil Procedure for the United States District Courts.

Allen v. *Regents of University System of Georgia*, 304 U.S. 439, 444-445, 58 S. Ct. 980, 982-983.

Watson v. *Buck*, 313 U.S. 387, 61 S. Ct. 962:—Action to restrain enforcement of Florida statutes relating to copyrighted musical compositions; three Attorneys General of Florida successively named as defendants (61 S.Ct. at page 965, footnote).

Dannenberg v. *Cohen*, 7 C.A., 213 F. 2d 944:—General rule stated at page 945, but in this instance the action was held not to relate to the performance of a continuing duty of the office of U.S. Attorney, instead to an alleged personal duty of a U.S. Attorney whose term of office had expired. Held, further, that there was no need to prosecute the petition to enjoin use in a criminal proceeding of documents alleged to have been taken from petitioner by an illegal search and seizure, since petitioner could move in the trial court to suppress this evidence.

II.

The requirements of Rule 25(d) are met by plaintiffs' allegations (a) that there is substantial need for continuing and maintaining this action against the present Director of the Department of Agriculture of California, in that a justiciable claim under sections 1331 and 1337 of the Judicial Code is pleaded in plaintiffs' complaint, and (b) that the [fol. 497] present Director continues the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States.

Allen v. *Regents of University System of Georgia*, 304 U.S. 439, 445, 58 S. Ct. 980, 983.

Porter v. *American Distilling Co.*, D.C. N.Y., 71 F.S. 483, 487-489.

By decision of the Supreme Court of the United States, it is now the law of this case that plaintiffs' complaint seeks to enjoin further enforcement against them of section 792 of the Agricultural Code of California on substantial grounds of federal unconstitutionality, also because it is in conflict with an Act of Congress regulating interstate commerce. (80 S. Ct. 568.)

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 498]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California, defendants.

MOTION TO RECONSIDER AND GRANT PLAINTIFFS' MOTION OF FEBRUARY 2, 1959 TO AMEND COMPLAINT—Filed April 29, 1960

The plaintiffs, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., by their undersigned attorney, move the court to reconsider and grant *nunc pro tunc* their motion filed February 2, 1959 to amend their complaint (a) by changing the description of the defendant Edmund G. Brown from Attorney General to Governor of the State of California, (b) by naming the present Attorney General, Stanley Mosk, as a party defendant, and (c) by striking out the name of Goodwin J. Knight, former governor, as a party defendant.

In support of this motion, the plaintiffs submit the following suggestions:

I.

All allegations of the complaint regarding acts of the [fol. 499] three defendants therein named, in their respective official capacities. No objection was made to the joinder as defendants of the persons then in office as governor and

as attorney general of California. A joint answer to the complaint was made by the three defendants, also joint motions to dismiss the complaint, granted January 13, 1959.

After participation by the governor and attorney general in all proceedings in the case without objection to their joinder as defendants, it appears incongruous to say that they were not proper parties.

II.

Because of the special provision of section 2284 (2) of the Judicial Code, this court would lack jurisdiction to hear the case without giving notice of such hearing to the persons then holding office as governor and attorney general of California, a requirement that would be meaningless if it did not give to these state officers the right to participate in the case in opposition to the complaint. (*Crescent Mfg. Co.* v. *Wilson*, C. A. 2d, 242 F. 462.) The right of these state officers to participate in the case, with full opportunity to oppose the complaint, is recognized and made effective by joining them as parties defendant.

III.

Although the term of office of Goodwin J. Knight as governor and of Edmund G. Brown as attorney general ended January 5, 1959, judgment was entered by the court on January 13, 1959 against plaintiffs and in favor of the three defendants named in the complaint, designated in their respective official capacities, dismissing the complaint and action and awarding costs to said defendants, and it must be presumed that said judgment was in fact procured by the attorneys for the defendants for the benefit of the officers then serving as governor, attorney general and di-
[fol. 500] rector of the Department of Agriculture of the State of California.

This alone satisfied the requirements of Rule 25(d) for substitution of parties defendant, as prayed for in plaintiffs' motion. (*Chin Chuck Ming* v. *Dulles*, C.A. 9, 225 F. 2d 849, 852.)

III.

After entry of said judgment on January 13, 1959, and after plaintiffs filed their notice of appeal and designation of record on February 12, 1959, *the three defendants jointly* filed a cross-designation of record on appeal, notwithstanding the objections theretofore filed by Edmund G. Brown, Governor, and Stanley Mosk, Attorney General, to plaintiffs' motion to amend their complaint and the order of the court filed February 20, 1959 denying plaintiffs' motion. Thereafter *the three defendants jointly*, designated in their official capacities, filed in the Supreme Court of the United States their appearance and motion to dismiss the appeal for lack of jurisdiction thereof, or to affirm the judgment of this court summarily, but the Supreme Court granted plenary hearing of the appeal and decided, first, that it had jurisdiction of the appeal, and second, that the judgment of this court was erroneous and should be reversed.

In an endeavor to sustain the judgment of this court on the appeal, as in the entry of the judgment, it is submitted the attorneys for the defendants (the Attorney General and Deputy Attorney General of California) must necessarily have acted as the authorized representatives of the persons then holding office, respectively, as governor, attorney general and director of the Department of Agriculture of California. A contrary conclusion would be rank fiction.

IV.

Considerations given effect in the court's order denying plaintiffs' motion of February 2, 1959, it is submitted, must [fol. 501] now be disregarded: (a) that the granting of the motion might be construed as inconsistent with the judgment of dismissal and so might breathe new life into the matter; (b) that allowance of the motion was not needed to enable plaintiffs to prosecute their appeal, or if needed the motion could be passed upon by the appellate court.

The case of *Dannenberg* v. *Cohen*, 213 F. 2d 944, cited in the court's memorandum, is not applicable to the case at bar in its present phase. The opinion in that case did not gainsay the general rule that an action relating to the performance of a continuing duty pertaining to a public office

does not abate on the retirement of the named officer and that the court has power to continue the cause against his successor in office. The court held, however, that the petition filed against the former U.S. Attorney to enjoin him from using in a criminal proceeding documents alleged to have been taken from petition by an illegal search and seizure was in the nature of a proceeding for a mandatory injunction to compel performance by the respondent of a personal duty no longer within his power to perform; and further, that the petition was not needed to obtain the relief sought, since the petitioner could file in the district court a motion to suppress the alleged illegal evidentiary matter. The present case deals with the continued exercise of power by the governor and attorney general, as an incident of official duty, to administer and enforce provisions of the state's Agricultural Code complained of by plaintiffs as unconstitutional.

Wherefore the plaintiffs pray that in order to make the pleadings conform with the actual proceedings in the case, and in order to comply effectively with the command of section 2284(2) of the Judicial Code, the order herein entered February 20, 1959 should be vacated and that in lieu [fol. 502] thereof an order should be entered *nunc pro tunc* granting plaintiffs' motion.

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 503] Certificate of service (omitted in printing).

[fol. 504] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND AND SUPPLEMENT COMPLAINT—Filed May 5, 1960

Come now the petitioners, Edmund G. Brown, Governor, State of California, and Stanley Mosk, Attorney General, State of California, and appear in the above-entitled action, *specially only*, and for the sole purpose of opposing plaintiffs' motion for leave to amend and supplement their complaint (1) by describing defendant Edmund G. Brown as Governor instead of Attorney General, State of California, and (2) by naming Stanley Mosk, Attorney General, State of California, as a party defendant, in substitution of Edmund G. Brown, former Attorney General, State of California. Plaintiffs' motion leaves unchanged the allegations in the body of their complaint. Petitioners oppose and ob-
[fol. 505] ject to plaintiffs' said motion on the following grounds:

Plaintiffs filed an identical motion on February 2, 1959, in this action which was denied by the Court by order filed February 20, 1959. In the course of its memorandum opinion, the Court found that "in their motion, plaintiffs have failed to show either that the Governor and the Attorney General are proper parties or that there is a substantial need for the substitution of the names of the new holders of those state officers", citing Federal Rules of Civil Procedure, Rule 25 (d) and *Danenberg* v. *Cohen*, 213 F. 2d 944. The Court also noted that the authority to review the Court's order existed at the appellate level in the appeal then pending to the United States Supreme Court. Plaintiffs made no application to substitute parties defendant to the Supreme Court, nor did they appeal from the appel-

able order of February 20, 1959. See *Sullivan* v. *Associated Bill Posters and Distributors*, 6 F. 2d 1000, which held that an order denying the right to revive an action for damages against executors of a deceased defendant is a "final decision" and reviewable by appeal. It follows that the Court's order of February 20, 1959, is a final order and is res judicata of the issues determined therein.

In any event, plaintiffs' motion is not well taken on the merits. Their real grievance is against W. C. Jacobsen, former Director of Agriculture, State of California, who five years ago in 1955 had allegedly threatened to enforce the 8% oil maturity requirements of section 792, Agricultural Code, to plaintiffs who were then shipping avocados into California (plaintiffs' complaint, paragraph XXVI). Plaintiffs' complaint does not show how they are aggrieved by any action of the Petitioners, Edmund G. Brown or Stanley Mosk. Controlling precedent in this situation is *Ex Parte Poresky*, 290 U. S. 30. In this case, the plaintiff had filed suit against the Governor, Attorney General, and [fol. 506] Registrar of Motor Vehicles, of the State of Massachusetts, to enjoin their enforcement of the Massachusetts compulsory automobile liability insurance statute. The Supreme Court of the United States affirmed the dismissal of the complaint as to the Governor and Attorney General upon the ground that they were improperly joined as parties.

Wherefore, petitioners pray that plaintiffs' motion be denied.

Respectfully submitted,

John Fourt, Deputy Attorney General.

[fol. 507] Affidavit of Service by Mail (omitted in printing).

[fol. 508] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND AND SUPPLEMENT COMPLAINT—Filed May 5, 196

Comes now the petitioner William E. Warne, Director of Agriculture, State of California, and appears in the above-entitled action, *specially only*, and for the sole purpose of opposing plaintiffs' motion for leave to amend and supplement their complaint by substituting William E. Warne, as party defendant in place of his predecessor in office, W. C. Jacobsen.

It is fundamental that a suit in the Federal Courts to enjoin a public officer from enforcing a statute is personal, and, in the absence of statutory provision for continuing it against his successor in office, the action abates upon his death or retirement from office (*Pullman Co.* v. *Croom*, [fol. 509] U. S. 571, 576; *United States* v. *Boutwell*, 17 Wall. 604). A successor in public office is not privy to his predecessor in respect of the alleged wrongful conduct (*Peonoyer* v. *McConnaughy*, 140 U. S. 1, 10; *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, 603-604). These principles are applicable to suits against State officers, because suits against such persons, *in their capacities as State officers*, constitute suits against a State in contravention of the 11th amendment (*Ex Parte Ayers*, 123 U. S. 443; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Fitz* v. *McGhee*, 172 U. S. 516; *In re State of New York*, 256 U. S. 490). The United States Supreme Court in its opinion 361 U. S. — 4 L. ed. 2d 568, in the above-entitled case held that the present complaint did allege facts showing that the defendant Jacobsen had committed a personal wrong against the plaintiffs, saying:

"As earlier stated, the complaint alleges that, since the issuance of the Secretary's [of Agriculture] Florida Avocado Order #69 in 1954, appellants have made more than a score of shipments in interstate commerce of Florida avocados to and for sale in California, and appellee's or their agents have in effect consistently condemned those avocados for failure to contain 8% or more of oil by weight, thus requiring appellants . . . to reship the avocados and sell them in other States, . . ."

Plaintiffs base their motion for substitution upon rule 25 (d) Federal Rules of Civil Procedure which provides, in part:

"Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of [fol. 510] the United States."

Plaintiffs have completely failed to make such a showing, except for the statement by counsel in their motion to substitute:

". . . plaintiffs allege that such statute will continue to be enforced against them by the present director as long as it remains in force unless deterred by the judicial declaration or writ of injunction as prayed for in plaintiffs' complaint" (Plaintiffs' motion, p. 2).

This statement merely follows the language of rule 25 (d). No facts are shown by affidavit, deposition or otherwise, from which the Court could find that petitioner has adopted or threatens to adopt, the attitude of his predecessor since taking office on January 4, 1960. Such a finding cannot be inferred from petitioner's having taken the oath of office (*Ex parte La Prade*, 289 U. S. 444, 458). In actual fact, it would have been physically impossible for petitioner to have taken action *of any kind* against the plaintiffs since he took the oath of office on January 4, 1960, because there have been no commercial shipments of Florida avocados

received in California from Florida from March 1, 195[illegible] the present time (Affidavit of S. R. Whipple, attach[illegible] hereto as Exhibit A). Similarly, there would have b[illegible] no occasion for him to threaten, or consider such acti[illegible] Petitioner's affidavit expressly denies having taken acti[illegible] or to have threatened action, against plaintiffs since ta[illegible] ing office as Director of Agriculture (Affidavit of Willia[illegible] E. Warne, attached hereto as Exhibit B).

There having been no showing made that petitioner ha[illegible] taken action against plaintiffs, nor that he has threatened t[illegible] take any action, petitioner prays that plaintiffs' moti[illegible] be denied.

[fol. 511] Respectfully submitted,

Stanley Mosk, Attorney General of the State o[illegible] California. John Fourt, Deputy Attorney Genera[illegible]
By: John Fourt.

[fol. 512]

EXHIBIT "A" TO SPECIAL APPEARANCE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California,

Defendant.

AFFIDAVIT OF S. R. WHIPPLE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Comes now S. R. WHIPPLE and deposes and says:

That he is Assistant Chief, Bureau of Fruit and Vegetable Standardization, California Department of Agriculture; that he has held said position since August, 1945; that in such position he is charged with the duty of supervising the inspection work performed by inspectors of the said Bureau of Fruit and Vegetable Standardization and in-
[fol. 513] spectors of the Central California County Agricultural Commissioners in the inspection of avocados, both domestic and imported found in California wholesale terminal markets. That, in such capacity, he has access to and is familiar with the records pertaining to avocados marketed in California maintained by the Director of Agriculture, and more particularly maintained by the Bu-

reaus of Fruit and Vegetable Standardization, Market News, and Agricultural Statistics in the California Department of Agriculture.

That the official records maintained by the said Director of Agriculture, and the said Bureaus of Fruit and Vegetable Standardization, Market News and Agricultural Statistics show that no commercial shipments of avocados grown in Florida arrived in California for purposes of sale or otherwise during the period of time March 1, 1958, to April 29, 1960, inclusive; that affiant has confirmed the reliability of these records by the receipt of reports from the County Agricultural Commissioners for the Counties of Los Angeles, Alameda and San Francisco, State of California, the principal receiving areas in California for avocados grown in Florida; that the records in the offices of the County Agricultural Commissioners for the said Counties of Los Angeles, Alameda, and San Francisco, disclose that no Florida avocados were inspected nor offered for inspection in their respective counties during the period of time March 1, 1958, to April 29, 1960.

/s/ S. R. WHIPPLE
S. R. Whipple

Subscribed and sworn to
before me this 2nd day
of May, 1960.

/s/ ANNE MARIE WISE
Notary Public in and for the
County of Sacramento,
State of California
My Commission Expires February 25, 1964

[SEAL]

[fol. 514]

EXHIBIT "B" TO SPECIAL APPEARANCE

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Plaintiffs,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture, of the State of California,

Defendant.

AFFIDAVIT OF WILLIAM E. WARNE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Comes now WILLIAM E. WARNE and deposes and says:

That since January 4, 1960, he has been the duly appointed, acting and qualified Director of Agriculture, State of California; denies that he has taken action, legal or otherwise, against Florida Lime and Avocado Growers, Inc., a corporation, or against South Florida Growers Association, Inc., a corporation, since January 4, 1960; denies that he has made threats of action of any nature against said corporations since January 4, 1960.

/s/ WILLIAM E. WARNE
William E. Warne

(Seal)

Subscribed and sworn to before me
this 4th day of May, 1960.

/s/ ANNE MARIE WISE
Notary Public in and for the County
of Sacramento, State of California
My Commission Expires February 25, 1964

[fol. 515] Affidavit of Service by Mail (omitted in printing).

[fol. 522] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ORDER GRANTING LEAVE TO PLAINTIFFS TO AMEND AND SUPPLEMENT COMPLAINT—Dated June 6, 1960 and filed June 13, 1960

On motion of the plaintiffs for leave to amend and supplement their complaint by substituting William E. Warne, present Director of the Department of Agriculture of the State of California, as party defendant in place of W. C. Jacobsen, his predecessor in said office, notice of said motion having been given to the attorneys for the defendants and to said William E. Warne, the court finds that there is substantial need for continuing this action against William E. Warne, as Director of the Department of Agriculture of the State of California, in substitution for his predecessor in said office, in order to obtain a final adjudication of the questions involved.

It is ordered, accordingly, that plaintiffs may amend and supplement their complaint by substituting William E. Warne, Director of the Department of Agriculture of the State of California, as party defendant in place of his

predecessor in said office, W. C. Jacobsen, such substitution to be without prejudice to the proceedings already had in this action, and all pleadings and motions hereto-
[fol. 523] fore filed herein on behalf of the defendant W. C. Jacobsen, former Director of the Department of Agriculture of the State of California, shall be regarded and given effect as if made by William E. Warne, Director of the Department of Agriculture of the State of California.

Dated: June 6th, 1960.

Sherrill Halbert United States District Judge.

[fol. 524] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ORDER GRANTING LEAVE TO PLAINTIFFS TO AMEND AND SUPPLEMENT COMPLAINT—Filed June 13, 1960

On reconsideration of plaintiffs' motion filed February 2, 1949 for leave to amend and supplement their complaint, notice of said motion having been given to the attorneys for the defendants, also to Edmund G. Brown, present governor of the State of California, and to Stanley Mosk, present attorney general of the State of California, the court finds that there is substantial need for continuing this action against Edmund G. Brown, in his capacity as governor in lieu of his former capacity as attorney general, also for adding Stanley Mosk, present attorney general, as a party defendant, in order to obtain a final adjudication of the questions involved.

It is ordered, accordingly, that plaintiffs may amend and supplement their complaint: (1) by designating the defendant Edmund G. Brown as governor in lieu of attorney general; (2) by adding as a party defendant the present

attorney general, Stanley Mosk; (3) by striking out the name of Goodwin J. Knight, former governor, as a party defendant.

[fol. 525] Such substitution of parties shall be made without prejudice to the proceedings already had in this action and all pleadings and motions heretofore filed by the defendants shall be regarded and given effect as if made by Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California, together with W. C. Jacobsen, former Director of the Department of Agriculture of the State of California.

Dated June 6, 1960.

Sherrill Halbert, United States District Judge.

[fol. 528] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California, defendants.

ANSWER OF WILLIAM E. WARNE—Filed June 14, 1960

Comes now William E. Warne, Director of Agriculture, State of California, and with leave of court files his answer to plaintiffs' complaint as amended, and for cause of defense alleges as follows:

First Defense

That this answering defendant admits the allegations contained in paragraphs II, V, VIII, X, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' complaint; that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 529] contained in paragraphs I, VI, VII, IX, XII, XIII, XIV, XV, XXII, XXIV(a), XXV and XXVII of plaintiffs' complaint and on said ground denies the truth of each and every allegation contained in said paragraphs; that this answering defendant denies the truth of each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVI, XXVIII, XXIX, XXX, XXXI and XXXII of plaintiffs' said complaint.

Second Defense

That plaintiffs' suit abated on January 4, 1960, the date when former defendant W. C. Jacobsen vacated the office of Director of Agriculture, State of California; that the court prejudicially erred and acted in excess of its jurisdiction in substituting this answering defendant in the place of the said W. C. Jacobsen.

Third Defense

That this court lacks jurisdiction for failure of the complaint to allege facts showing the existence of a case or controversy within Constitution, Article III.

Fourth Defense

That this court lacks jurisdiction over the subject matter set forth in the complaint.

Fifth Defense

That the complaint fails to state a case within the equity jurisdiction of the court.

Sixth Defense

That the complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 530] Seventh Defense

That the federal constitutional questions raised by the pleadings may be avoided or simplified or their posture changed if the state enactments in question are first construed by the authoritative decision of a California court that this court should stay further proceedings pending an authoritative determination of doubtful state law in the state courts of California.

Eighth Defense

That the quality and maturity standards purported promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R. 969), the promulgation, and the methods and procedure used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act, of 1937, as amended (7 U.S.C.A. 601 et seq.).

Ninth Defense

That sections 784 and 792, California Agricultural Code constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesome avocados, thus maintaining the industry reputation, and consumer and trade market demand, for mature, wholesome, nutritious avocados.

[fol. 531] Wherefore, defendant prays:

1. That the plaintiffs' said complaint be dismissed:

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendant be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendant his costs.

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendant, William E. Warne, Director of Agriculture.

[fol. 532] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

ANSWER OF EDMUND G. BROWN AND STANLEY MOSK—
Filed June 14, 1960

Come now Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California, and with leave of court file their answer to plaintiffs' complaint as amended, and for cause of defense allege as follows:

First Defense

That these answering defendants admit the allegations contained in paragraphs II, V, VIII, X, XI, XVII, XVIII, XIX, XX and XXI of plaintiffs' complaint; that these an-[fol. 533] swering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VI, VII, IX, XII, XIII, XIV, XV, XXII, XXIV(a), XXV and XXVII of plaintiffs' complaint and on said ground deny the truth of each and every allegation contained in said paragraphs; that these answering defendants deny the truth of each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVI, XXVIII, XXIX XXX, XXXI and XXXII of plaintiffs' said complaint.

Second Defense

That plaintiffs' suit abated on January 4, 1960, the da when former defendant W. C. Jacobsen, the sole defendant vacated the office of Director of Agriculture; that the cour prejudicially erred and acted in excess of its jurisdiction i adding as parties these answering defendants.

Third Defense

That this court lacks jurisdiction for failure of the com plaint to allege facts showing the existence of a case o controversy within Constitution, Article III.

Fourth Defense

That this court lacks jurisdiction over the subject matte set forth in the complaint.

Fifth Defense

That the complaint fails to state a case within the equit jurisdiction of the court.

[fol. 534] Sixth Defense

That the complaint fails to state a claim against these answering defendants upon which relief can be granted.

Seventh Defense

That the federal constitutional questions raised by the pleadings may be avoided or simplified or their posture changed if the state enactments in question are first con strued by the authoritative decision of a California court; that this court should stay further proceedings pending an authoritative determination of doubtful state law in the state courts of California.

Eighth Defense

That the quality and maturity standards purportedly promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R.

969), the promulgation, and the methods and procedures used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.).

Ninth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing [fol. 535] of immature, unwholesome avocados, thus maintaining the industry reputation, and consumer and trade market demand, for mature, wholesome, nutritious avocados.

Wherefore, these answering defendants pray:

1. That the plaintiffs' said complaint be dismissed;

2. That sections 784 and 792, California Agricutural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That these answering defendants be granted such other relief in the premises as the court may deem just and proper.

4. That the court award to these answering defendants their costs.

John Fourt, Deputy Attorney General of the State of California, Attorney for Defendants Edmund G. Brown and Stanley Mosk.

[fol. 537]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

DEFENDANTS' WRITTEN INTERROGATORIES (GEORGE NORRIS)
Filed August 19, 1960

1. *Please state your name and address.*

2. Please state your present occupation or professio

3. How long have you been a resident of Miami, Florid

4. Are you personally acquainted with William F Warne, a defendant in this action?

5. Are you personally acquainted with Stanley Mosk defendant in this action?

6. Are you personally acquainted with Edmund G Brown, a defendant in this action?

7. Did you on Wednesday, November 12, 1958, purcha [fol. 538] a flat of Florida avocados?

8. From whom did you purchase this flat of avocados?

9. Did you in purchasing this flat of avocados ask for a particular variety?

10. If so, state the variety you asked for.

11. What size avocados were packed in the flat?

12. Please describe the box in which the avocados we contained.

13. In which city did you purchase this flat of avocad

14. From whom did you purchase this flat of avocad

15. At what address did you purchase this flat of av cados?

Instruction to officer taking deposition:

Please have marked for identification as Defendants' Exhibit 3 the cash receipt from South Florida Growers Association, Inc., dated November 12, 1958.

16. Please identify Defendants' Exhibit 3 for identification.

17. Please identify for the record the South Florida Growers Association, Inc.

18. Does Defendants' Exhibit 3 for identification bear any relationship to the flat of avocados purchased by you on November 12, 1958?

19. Please explain this relationship.

20. Was a charge made for these avocados?

21. What was the amount of this charge, and did you pay this charge?

22. Please describe the packing house in Goulds, Florida, where you purchased the flat of avocados.

23. At what time of the day on November 12, 1958, did you purchase these avocados?

24. After the purchase of the flat of avocados at Goulds, Florida, what did you do with the flat of avocados?

[fol. 539] 25. At what time of day on November 12, 1958, did you deliver this flat of avocados to the Air Express company office?

26. Where was this office located?

Instruction to officer taking deposition:

Please mark Air Express receipt 73-94-06 as Defendants' Exhibit 4 for identification.

27. Please identify Defendants' Exhibit 4 for identification.

28. Does Defendants' Exhibit 4 for identification bear any relationship to the flat of avocados purchased by you on November 12, 1958?

29. Does Defendants' Exhibit 4 for identification bear any relationship to Defendants' Exhibit 3 for identification?

30. What was the amount of the express charges on the shipment represented by Defendants' Exhibit 4 for identification?

31. Were these charges paid by you?

32. Who was the designated consignee on this Air Express shipment?

33. What was the address for the consignee specified by you?

34. Please identify who the consignee on the shipment was.

35. After shipping this flat of avocados did you receive notice that this flat of avocados was received by the consignee in Sacramento, California?

36. Did you on Thursday, December 4, 1958, purchase a flat of Florida avocados?

37. From whom did you purchase this flat of avocados?

38. Did you in purchasing this flat of avocados ask for a particular variety?

39. If so, state what variety you asked for.

40. What size avocados were packed in the flat?

41. Please describe the box in which the avocados were contained.

[fol. 540] 42. In which city did you purchase this flat of avocados?

43. From whom did you purchase this flat of avocados?

44. At what address did you purchase this flat of avocados?

Instruction to officer taking deposition:

Please have marked for identification as Defendants' Exhibit 1 the cash receipt from South Florida Growers Association, Inc., dated December 4, 1958.

45. Please identify Defendants' Exhibit 1 for identification.

46. Please identify for the record the South Florida Growers Association, Inc.

47. Does Defendants' Exhibit 1 for identification bear any relationship to the flat of avocados purchased by you on December 4, 1958?

48. Please explain this relationship.

49. Was a charge made for these avocados?

50. What was the amount of this charge, and did you pay this charge?

51. Please describe the packing house in Goulds, Florida, where you purchased the flat of avocados.

52. At what time of the day on December 4, 1958, did you purchase these avocados?

53. After the purchase of the flat of avocados at Goulds, Florida, what did you do with the flat of avocados?

54. At what time of day on December 4, 1958, did you deliver this flat of avocados to the Air Express company office?

55. Where was this office located?

Instruction to officer taking deposition:

Please mark Air Express receipt 24-06-61 as Defendants' Exhibit 2 for identification.

56. Please identify Defendants' Exhibit 2 for identification.

57. Does Defendants' Exhibit 2 for identification bear [fol. 541] any relationship to the flat of avocados purchased by you on December 4, 1958?

58. Does Defendants' Exhibit 2 for identification bear any relationship to Defendants' Exhibit 1 for identification?

59. What was the amount of the express charges on the shipment represented by Defendants' Exhibit 2 for identification?

60. Were these charges paid by you?

61. Who was the designated consignee on this Air Express shipment?

62. What was the address for the consignee specified by you?

63. Please identify who the consignee on the shipment was.

64. After shipping this flat of avocados did you receive notice that this flat of avocados was received by the consignee in Sacramento, California?

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendants.

[fol. 542] Affidavit of Service by Mail (omitted in printing).

[fol. 543] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

ANSWERS OF GEORGE NORRIS TO DIRECT INTERROGATORIES PROPOUNDED ON BEHALF OF DEFENDANTS—
Filed August 10, 1960

Thereupon: George Norris having been first duly sworn, responded to direct interrogatories numbers 1 through 6 as follows:

1. My name is George Norris. My present address is 114 Southwest 57th Court, Miami, Florida.

2. Real estate salesman.

3. Since 1944.

4. No.

5. No.

[fol. 544] 6. No.

7. Yes.

8. South Florida Growers Asociation, Inc.

9. Yes.

10. Lula Variety.

11. Size 16.

12. Just an ordinary flat wooden box which is used regularly for packing and shipping avocados.

13. Goulds, Florida.

14. South Florida Growers Association, Inc.

15. At the packing house of South Florida Growers Association, Inc., located on U.S. 1 in Goulds, Florida.

(Cash receipt from South Florida Growers Association, Inc., dated November 12, 1958, marked Defendants' Exhibit 3 for identification.)

16. Defendants' Exhibit 3 for identification is a cash receipt of South Florida Growers Association, Inc., covering purchase by me of one flat of avocados, Size 16.

17. To the best of my knowledge South Florida Growers Association, Inc., is an organization located in Goulds, Florida, which buys, sells and packs acvocados.

18. Yes.

19. Defendants' Exhibit 3 for identification is a memorandum receipt for the purchase of a flat of avocados by me from South Florida Growers Association, Inc., on November 12, 1958.

20. Yes.

[fol. 545] 21. The amount of the charge was $2.25 for which I paid cash to South Florida Growers Association, Inc.

22. The packing house of South Florida Growers Association, Inc., located at Goulds, Florida, on U.S.1 is a packing house built and operated by South Florida Growers Association for the handling, shipping and packing of avocados. Rollers move the avocados from one operation to another.

23. 3:45 P.M.

24. I took the flat of avocados over to the Miami International Airport and turned them over to the Air Express Division of Railway Express Agency, consigning same to the Department of Agriculture of California at Sacramento, California.

25. 5:10 P.M.

26. At the Miami International Airport at Northwest 36th Street, Miami, Florida.

(Air Express receipt 73-94-06, dated November 12, 1958, marked Defendants' Exhibit 4 for identification.)

27. Defendants' Exhibit 4 for identification is an Air Express receipt issued to me by the Railway Express Agency covering the Air Express shipment of one flat of

avocados purchased by me from South Florida Growers Association, Inc., on November 12, 1958.

28. Yes.

29. Yes.

30. $21.60.

[fol. 546] 31. No.

32. S. Robert Whipple, Department of Agriculture, Sacramento, California.

33. Same as answer given to question 32.

34. S. Robert Whipple, c/o Department of Agriculture, Sacramento, California.

35. I have no recollection of receiving notification of delivery of said shipment.

36. Yes.

37. South Florida Growers Association, Inc.

38. Yes.

39. I asked for a flat of Lula avocados.

40. Size 16.

41. See answer 12 above.

42. Goulds, Florida.

43. South Florida Growers Association, Inc.

44. At the address of South Florida Growers Association, Inc., located on U.S. 1 at Goulds, Florida.

(Cash receipt D-4897, dated December 4, 1958, marked Defendants' Exhibit 1 for identification.)

45. Defendants' Exhibit 1 for identification is a cash receipt given me by South Florida Growers Association, Inc., dated December 4, 1958, in the amount of $2.10, covering purchase of one flat of size 16 avocados.

46. See answer 17 above.

47. Yes.

[fol. 547] 48. Defendants' Exhibit 1 for identification is the cash receipt given to me by South Florida Growers Association, Inc., for the purchase by me of one flat of size 1 avocados, on December 4, 1958.

49. Yes.

50. $2.10. I paid said sum.

51. The packing house of South Florida Growers Association, Inc., herein above referred to is a packing house located in Goulds, Florida, on U. S. 1, which is utilized by said organization for the grading, packing and shipping of avocados.

52. 4:35 P.M.

53. After the purchase of the said flat of avocados at Goulds, Florida, from South Florida Growers Association, Inc., I delivered same to the Air Express Division of the Railway Express Agency at International Airport of Miami on Northwest 36th Street, Miami, Florida.

54. About 7:35 P.M. on December 4, 1958.

55. It is located at the Miami International Airport on Northwest 36th Street in Miami, Florida.

(Air Express receipt 24-06-61, dated December 4, 1958, marked Defendants' Exhibit 2 for identification.)

56. Defendants' Exhibit 2 for identification is a receipt given me by the Air Express Division of the Railway Express Agency on December 4, 1958, covering an Air Express shipment of one flat of avocados.

[fol. 548] 57. Yes.

58. Yes.

59. $14.82.

60. No.

61. S. Robert Whipple, Sacramento, California.

62. S. Robert Whipple, c/o Department of Agriculture of California, Sacramento, California.

63. S. Robert Whipple.

64. I have no recollection of such notification.

And Further Deponent Saith Not.

George Norris

Sworn to and subscribed before me this 18th day of August, 1960.

Henry E. Colman, Notary Public in and for the State of Florida at Large.

My commission expires: February 5, 1961.

(Notarial Seal)

[fol. 549]

DEFENDANTS' EXHIBIT NO. 1 TO ANSWERS, ETC.

(See opposite) ☞

[fol. 549]

South Florida Growers Association, Inc.

HAROLD E. EENDALL, Mgr.

GOULDS, FLORIDA

Phones Homestead 1830
Miami 83-2216

P. O. Box 468

LIMES - AVOCADOS - MANGOS

International Fertilizers - Cane Material - Growers Supplies

Customer's Order No. _____ Date _____ 195 8

M. [illegible] 4

Address [illegible]

SOLD BY	CASH	C.O.D.	CHARGE	ON ACCT.	PAID OUT	

QUAN.	DESCRIPTION	PRICE	AMOUNT	
1	1/4" Ave. 16"			

Paid

All claims and [illegible] this bill.

D 4897

Received by _____

S. S. Herman Printing, Miami 35, Fla.

[fol. 550]

DEFENDANTS' EXHIBIT NO. 2 TO ANSWERS, ETC.



(See opposite) ☞

Uniform Express Receipt AIR EXPRESS

COLLECT

NON-NEGOTIABLE

AIR EXPRESS

AIR EXPRESS

division of RAILWAY EXPRESS AGENCY

(AES 17)
9-58
Printed in U.S.A.

Sacramento Calif
Mel A. Robt Wilkett
4-06-61
Via Final Airport
Declared Value
Via First Airport
(2445-D) Miami, Fla. MZ 440
Actual Weight
Air
Chgs. Dest.
Collect
Shipper
George Harris
3738 Nar 22 St
SHIPPER'S RECEIPT
Collect
Air Express
RAIL CHARGES
Advances
Value Charge To Airport
Rail Exp. Chgs. To Airport
Value Charge From Airport
Rail Exp. and Other Chgs. From Airport
Total Rail Charges
AIR CHARGES
Advances
Air Value Charge
Total Air Charges
Total Rail and Air
Tax
C. O. D.
C. O. D. Service Charge
Total to Collect

NOTE—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

ATTENTION OF SHIPPER. The terms and conditions of the air express receipt under which this shipment is accepted are printed on the back hereof.

Received shipment described herein, subject to the Classifications and Tariffs in effect on the date hereof, value herein declared by Shipper to be that covered in space hereon reading "Declared Value" which the Company agrees to carry upon the terms and conditions printed herein, to which the Shipper agrees and as evidenced thereof accepts this receipt.

Agent
Per the Company
Number Pieces
Date

[fol. 550]

DEFENDANTS' EXHIBIT NO. 2 TO ANSWERS, ETC.

[fol. 551]

RAILWAY EXPRESS AGENCY, INC. — AIR EXPRESS

UNIFORM RECEIPT—NON-NEGO

TERMS AND CONDITIONS

The provisions of this receipt shall inure to the benefit of and g upon the consignor, the consignee, and all carriers handling ment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

b. The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice thereof.

c. Improper or insufficient packing, securing, or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed as to secure safe transportation by express with ordinary care.

6. When consigned to a place at which the express company has no office, shipments must be marked with the name of the express station at which delivery will be accepted or be marked with forwarding directions if to go beyond the express company's line; by a carrier other than an express company. If not so marked shipments will be refused.

7. All conditions precedent to recovery against any carrier, whether [illegible] delivery, or otherwise, must be complied with by the shipper, consignor, or consignee within nine months after delivery of the property (or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed) and suit must be instituted within two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not so made and suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

8. The company shall not be liable for loss of or damage to articles shipped C. O. D. unless such loss or damage be due to the negligence of the company, and any claim for loss or damage must be made within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. The company will not be responsible for the collection of the proceeds of any C. O. D. shipment or for the correctness of any receipt taken therefor. Any check or draft given in payment of any C. O. D. shipment will be received subject to collection and at the risk of the consignor. The company will not be liable for any loss or damage occurring after the expiration of thirty days after the property is held at the office of the company subject to the consignee's order after notice of its arrival has been given by the carrier to the claimant that the carrier has disallowed claim or any part or parts thereof. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service; at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded by Vessel from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs. Claims for loss, damage or delay must be made in writing to the carrier at the port of export or to the carrier issuing this receipt within nine months after delivery of the property at said port or in case of failure to make such delivery then within nine months and fifteen days after date of shipment; and claims so made against said delivering or issuing carrier shall be deemed to have been made against any carrier which may be liable hereunder. Suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Where claims are not so made, and/or suits are not instituted thereon in accordance with the foregoing provisions, the carrier shall not be liable.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs duties, taxes, or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property.

Special Additional Provisions as to Air Service.

13. The company will not accept for transportation in air service any single shipment of personal value of which in excess of $500.00, unless [illegible] on the [illegible] and [illegible] with the consignor [illegible] the [illegible] to the consignee.

[fol. 552]

[fol. 552]

DEFENDANTS' EXHIBIT NO. 3 TO ANSWERS, ETC.

South Florida Growers As[illegible]ion, Inc.

HAROLD E. KENDALL, Mgr.

GOULDS, FLORIDA

Phones Homestead 1830
Miami 82-2216

P. O. Box 468

LIMES - AVOCADOS - MANGOS

International Fertilizers - Crate Material - Growers Supplies

Customer's Order No. _____ Date Nov. 12 1938

M Cash

Address _____

SOLD BY	CASH	C. O. D.	CHARGE	ON ACCT.	RDSE. RETD.	PAID OUT	

QUAN.	DESCRIPTION	PRICE	AMOUNT	
1	Flat Avo. 16		2	25
	Paid			

ALL claims and returned goods MUST be accompanied by this bill.

D 4786 Rec'd by _____

S. L. DONSELLS SERVICES, MIAMI 42, FLA.

[fol. 553]

DEFENDANTS' EXHIBIT NO. 4 TO ANSWERS, ETC.

(See opposite) ☞

Uniform Express Receipt AIR EXPRESS

COLLECT
NON-NEGOTIABLE

AIR EXPRESS

AIR EXPRESS

division of RAILWAY EXPRESS AGENCY

(AES 17)
3-58
Printed in U.S.A.

Destination City: Sacramento Calif. | Via Final Airport:

Consignee: Mr. A. Robert Ulfigal | Receipt Number: 73-94-06 | Date Shipped: Nov 12 1958 | Hour: 6 P.M.

Shipper: Dept of Agriculture | Declared Value:

Forwarding Agent: Bureau of Fruit & Veg Standardization | Via First Airport:

(2445-D) Miami, Fla. RZ 440

Pieces	Articles	Nature of Contents	Actual Weight	SCALE NOS.	
1	Crate Avocados		18	Actual	26
				Gross	Dest.
				Dimensional Weight	Entered by

Shipper: Hoppe Norris

Address of Shipper at Final Point of Origin: 531 N.W. 2 St.

Charges: Paid / Air | Paid in Part

SHIPPER'S RECEIPT
Collect
Air Express

RAIL CHARGES	AIR CHARGES
Advances	Advances
Value Charge To Airport	Air Value Charge
Rail Exp. Chgs. To Airport	Air Express Charges 21 60
Value Charge From Airport	Total Air Charges
Rail Exp. and Other Chgs. From Airport	Total Rail and Air
Total Rail Charges	Tax
	C. O. D.
	C. O. D. Service Charge
	Total to Collect 21 60

NOTE—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

ATTENTION OF SHIPPER. The terms and conditions of the air express receipt under which this shipment is accepted are printed on the back hereof.

Received shipment described hereon, subject to the Classifications and Tariffs in effect on the date hereof, value herein declared by Shipper to be that entered in space hereon reading "Declared Value," which the Company agrees to carry upon the terms and conditions printed hereon, to which the Shipper agrees and as evidence thereof accepts this receipt.

Agent's Signature: J. H. Whitehead | Number Pieces: 1 | Date: 11/12 1958 | Hour: 8 A.M. P.M.

Agent Completing

DEFENDANTS' EXHIBIT NO. 4 TO ANSWERS, ETC.

[fol. 553]

RAILWAY EXPRESS AGENCY, INC. — AIR EXPRESS

UNIFORM RECEIPT—NON-NEGO

1. The provisions of this receipt shall inure to the benefit of and b[inding] upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

b. The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing, or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor to consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When consigned to a place at which the express company has no office, shipments must be marked with the name of the express station at which delivery will be accepted or be marked with forwarding directions if to go beyond the express company's line by carrier other than an express company. If not so marked shipments will be refused.

7. As conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within nine months after delivery of the property or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Unless claims are so made and suits are instituted thereon in accordance with the foregoing provisions, no carrier shall be liable, and such claims will not be entertained.

8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service, at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded by Vessel from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs. Claims for loss, damage or delay must be made in writing to the carrier at the port of export or to the carrier issuing this receipt within nine months after delivery of the property at said port or in case of failure to make such delivery then within nine months and fifteen days after date of shipment; and claims so made against said delivering or issuing carrier shall be deemed to have been made against any carrier which may be liable hereunder. Suits shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof. Where claims are not so made, and/or suits are not instituted thereon in accordance with the foregoing provisions, the carrier shall not be liable.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs duties, taxes, or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property.

Special Additional Provisions as to Air Service.

13. The company will not accept for transportation in air service any single shipment the declared value of which is more than $25,000.00, explosives, articles of an inflammable nature, acids, or live freight, except to the extent otherwise permitted by its tariffs, published and filed with regulatory Boards and Commissions.

14. Fragile articles liable to damage from shock will not be accepted in Air Service.

[fol. 555] [File endorsement omitted]

DEFENDANTS' EXHIBIT "C"

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC. and SOUTH FLORIDA GROWERS ASSOCIATION, INC., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

ANSWERS OF FRED PIOWATY, SECRETARY OF FLORIDA LIME AND AVOCADO GROWERS, INC., TO DEFENDANTS' INTERROGATORIES —Filed October 10, 1960

Interrogatory No. 1: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1958?
Answer: $101,203.55.

Interrogatory No. 2: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1959?
Answer: $101,051.74.

Interrogatory No. 3: What was the net worth of Florida Lime and Avocado Growers, Inc. as of March 31, 1960?
Answer: $91,322.19.

Interrogatory No. 4: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1958?
Answer: $723,649.67.

Interrogatory No. 5: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1959?
Answer: $336,214.10.

[fol. 556] *Interrogatory No. 6*: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from all business during the fiscal year ending March 31, 1960?
Answer: $715,667.68.

Interrogatory No. 7: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1958?
Answer: $209,958.09.

Interrogatory No. 8: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from the sale of avocados during the fiscal year ending March 31, 1959?
Answer: $80,428.08.

Interrogatory No. 9: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados during the fiscal year ending March 31, 1960?
Answer: $247,599.22.

Interrogatory No. 10: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1958?
Answer: $16,893.34.

Interrogatory No. 11: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1959?
Answer: Zero.

Interrogatory No. 12: What were the gross receipts of Florida Lime and Avocado Growers, Inc. from sale of avocados in California during the fiscal year ending March 31, 1960?
Answer: Zero.

/s/ Fred Piowaty
Secretary of Florida Lime and Avocado Growers, Inc.

[fol. 557] *Duly sworn to by Fred Piowaty, jurat omitted in printing.*

[fol. 558]

DEFENDANTS' EXHIBIT "D"

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC. and SOUTH FLORIDA GROWERS ASSOCIATION, INC., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

ANSWERS OF HAROLD E. KENDALL, PRESIDENT OF SOUTH FLORIDA GROWERS ASSOCIATION, INC., TO DEFENDANTS' INTERROGATORIES—Filed October 10, 1962

Interrogatory No. 1: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1958, for the fiscal year March 31, 1957 to March 31, 1958?
Answer: $20,614.16.

Interrogatory No. 2: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1959, for the fiscal year March 31, 1958 to March 31, 1959?
Answer: $34,810.57.

Interrogatory No. 3: What was the net worth of South Florida Growers Association, Inc., as of March 31, 1960, for the fiscal year March 31, 1959 to March 31, 1960?
Answer: $42,661.27.

Interrogatory No. 4: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1958?
Answer: $1,293,445.68.

[fol. 559] *Interrogatory No. 5*: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1959?
Answer: $708,850.61.

Interrogatory No. 6: What were the gross receipts of South Florida Growers Association, Inc., from all business during the fiscal year ending March 31, 1960?
Answer: $994,421.41.

Interrogatory No. 7: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1958?
Answer: $974,201.75.

Interrogatory No. 8: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1959?
Answer: $524,514.55.

Interrogatory No. 9: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados during the fiscal year ending March 31, 1960?
Answer: $581,288.21.

Interrogatory No. 10: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1958?
Answer: $12,973.78.

Interrogatory No. 11: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1959?
Answer: —0—.

Interrogatory No. 12: What were the gross receipts of South Florida Growers Association, Inc., from the sale of avocados in California during the fiscal year ending March 31, 1960?
Answer: —0—.

/s/ HAROLD E. KENDALL
President of South Florida
Growers Association, Inc.

[fol. 560] *Duly sworn to by Harold E. Kendall. Jurat omitted in printing.*

[fol. 561] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., plaintiffs,

vs.

WILLIAM E. WARNE, Director of the Department of Agriculture of the State of California, et al., defendants.

MOTION OF PLAINTIFFS FOR LEAVE TO SUBSTITUTE JAMES T. RALPH AS DEFENDANT IN PLACE OF WILLIAM E. WARNE—Filed January 27, 1961

To James T. Ralph, Director of the Department of Agriculture of the State of California, and to Stanley Mosk, Attorney General, and John Fourt, Deputy Attorney General, attorneys for defendants:

Please take notice that the plaintiffs herein have filed a motion for leave to amend and supplement their complaint by substituting James T. Ralph, Director of the Department of Agriculture, as a party defendant in this action in place of William E. Warne, his predecessor in said office, on the ground that such substitution of defendants is needed in order to obtain a final adjudication of the questions involved (said William E. Warne having resigned as director and vacated the office as of the close of business on January 2, 1961 and said James T. Ralph having succeeded to the office on January 3, 1961). The plaintiffs waive oral hearing on this motion and consent to presentation of the motion to the court at any time prior to trial of the case.

January 25, 1961.

Isaac E. Ferguson, Attorney for plaintiffs.

Copy of motion, proposed order and proposed amendment mailed to attorneys for defendants, also James T. Ralph, January 25, 1961—Isaac E. Ferguson.

[fol. 584]

APPENDIX "B" TO TRIAL BRIEF

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

STIPULATION RE PLAINTIFF CORPORATIONS—
Filed February 1, 1961

IT IS HEREBY STIPULATED between the parties hereto, through their counsel of record, that the plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956, and that it is not in arrears in the payment of its capital stock tax; and that the plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953, and is current in its payment of capital stock tax.

Dated: September 29, 1960.

/s/ ISAAC E. FERGUSON
Attorney for Plaintiffs

STANLEY MOSK, Attorney General
JOHN FOURT, Deputy Attorney General

By .....
Attorneys for Defendants

Exhibit A

[fol. 585] APPENDIX "C" TO TRIAL BRIEF

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

No. 7648 Civil Action

[Title omitted]

STIPULATION RE EXHIBITS—Filed February 1, 1961

IT IS HEREBY STIPULATED by and between the parties hereto, through their counsel of record, that the following listed documents may be introduced into evidence as defendants' exhibits without further proof of authenticity:

Document	*Exhibit*
1. Cash receipt #D-4786, South Florida Growers Association, Inc., dated November 12, 1958.	Defendants' Exhibit No. 1
2. Air express receipt #73-94-06, dated November 12, 1958.	Defendants' Exhibit No. 2
[fol. 586]	
3. Cash receipt #4897, South Florida Growers Association, Inc., dated December 4, 1958.	Defendants' Exhibit No. 3
4. Air express receipt #74-06-61, dated December 4, 1958.	Defendants' Exhibit No. 4

Dated: August 19, 1960.

STANLEY MOSK, Attorney General
of the State of California
JOHN FOURT, Deputy Attorney General

By /s/ JOHN FOURT
Attorneys for Defendants

/s/ ISAAC E. FERGUSON
Attorneys for Plaintiffs

[fol. 587] Affidavit of Service by Mail (omitted in printing).

[fol. 588] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

MOTION OF PLAINTIFFS FOR LEAVE TO SUBSTITUTE CHARLES PAUL AS DEFENDANT IN PLACE OF WILLIAM E. WARNE—
Filed February 6, 1961

To Charles Paul, Director of the Department of Agriculture, and Stanley Mosk, Attorney General; and John Fourt, Deputy Attorney General, attorney for defendants:

Please take notice that on Tuesday, February 7, 1961, upon the call of the above-entitled case for trial, plaintiffs will move the court for leave to amend and supplement their complaint by substituting Charles Paul, Director of the Department of Agriculture, as a party defendant in this action in place of William E. Warne, former Director of the Department of Agriculture, on the ground that there is substantial need for continuing this action against said Charles Paul, who took office as Director of the Department of Agriculture on February 1, 1961, in order to obtain a final adjudication of the questions involved, such substitution of parties to be without prejudice to the proceedings already had in the action.

February 3, 1961.

Isaac E. Ferguson, attorney for plaintiffs

[fol. 1]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Before:

HON. HOMER T. BONE, Circuit Judge, HON. LOUIS E. GOODMAN, District Judge, HON. SHERRILL HALBERT, District Judge.

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Plaintiffs,

vs.

WILLIAM E. WARNE, Director of Agriculture of the State of California, et al., Defendant.

Sacramento, California

REPORTER'S TRANSCRIPT OF HEARING (PARTIAL)—
February 7, 1961

APPEARANCES:

For the Plaintiffs:

Isaac E. Ferguson, Esq., 13016 Victory Boulevard, North Hollywood, California.

For the Defendants:

John Fourt, Esq., Deputy Atty. Gen. and Lawrence E. Doxsee, Esq., Deputy Atty. Gen. Library and Courts Building, Sacramento, California.

William A. Norris, Esq., (Tuttle, Tuttle & Taylor) 711 Equitable Life Building, 411 West Fifth Street, Los Angeles, California.

[fol. 1a] Reporter's Note: Opening statements of Counsel and discussion between Court and Counsel preliminary to taking of testimony was reported but by stipulation is not incorporated in this transcript.)

[fol. 2] Tuesday, February 7, 1961

PAUL LOUIS HARDING, called as a witness on behalf of Plaintiffs, Sworn:

The Clerk: Your name, please?
The Witness: Paul Louis Harding.
Mr. Ferguson: State your residence, Dr. Harding?
The Witness: My residence is Orlando, Florida.

Direct examination.

By Mr. Ferguson:

Q. Is that the place of your employment also?

A. I have charge of the U. S. Horticultural Field Station at Orlando and also the Agriculture Marketing Service Station at Miami, Florida.

Q. And you have stated before that you are an employee or officer of the United States Department of Agriculture?

A. I am an employee of the Department of Agriculture, yes.

Q. How long have you been employed by the Department of Agriculture?

A. I have been with the Department of Agriculture since 1930.

Q. Preceding that what was your training for the work with the Department of Agriculture?

A. I was raised in Utah. I received a B.S. degree from the Brigham University. I attended graduate work at the [fol. 3] University of Utah, graduate work at Utah State Agricultural College, and in 1930 I received a Doctor of Philosophy degree from Iowa State College.

Q. What were your special subjects?

A. My special subjects were horticultural plant physiology and plant chemistry.

Q. Then right after that you entered Government employ?

A. In 1930 I received an appointment to the U. S. Department of Agriculture, yes, in Washington, D. C.

Q. What positions have you held in the Department of Agriculture, and what have been your duties?

A. Before going with the Department of Agriculture I was on the staff of Iowa State College in the horticultural department, and then after entering service with the U. S. Department of Agriculture, and I am referring to my notes, I entered as an assistant horticulturist in 1930, and was promoted to an associate horticulturist in 1934, and to a plant physiologist in 1947, and to principal plant physiologist in 1949, and in 1959 I had the title of Supervisory Plant Physiologist.

Q. And something about the nature of your duties?

A. Well, the nature of my duties, of course, was to supervise the work of my group, which is the agricultural marketing service unit in Florida, including Orlando and Miami.

Q. And what is the nature of the work to which you refer?

[fol. 4] A. At our station we have some twenty-odd line projects. These include work with citrus and other subtropical fruits, which would take in your mangoes and your avocados.

Q. What do you mean by projects?

A. A line project is a line of work which has been approved by the Department of Agriculture. It is a project to which budgetary money is set aside to do that particular work, and the project is carried on and the progress reported to the Department of Agriculture and is incorporated in the report to the secretary as the annual report.

It also carries another meaning. The line project is also—which designates the type of work is submitted to a national advisory committee, and I might point out that this committee is made up of men from all over the United States who represent the various types of products, and they review these projects as to the progress and make recommendations back to the Secretary of Agriculture.

Q. These are research projects that you are referring to?

A. I am referring to research projects.

Q. In 1935 did you receive some special assignment?

A. The citrus industry in Florida requested the Department of Agriculture to do work on this question of maturity of fruits, particularly with the citrus fruits, and I was assigned to Florida. Prior to that time I was stationed in Washington.

[fol. 5] Q. Did Florida then have standardization laws governing citrus fruits?

A. Yes, they had standards governing the shipment of fruit. It was a rather unsatisfactory standard, and the industry felt that if the Department of Agriculture, who was a non-partisan party, would undertake the studies they would be very much appreciative of it, and I was sent to Florida to carry on that work.

Q. Did you conduct such studies for some years?

A. I have not only conducted, but I have continued with that work from 1935 in Florida to the present time.

Q. And what fruits?

A. The first fruit that I undertook, of course, was the principal one, and that was oranges. After completing the work on oranges, which included the period of three or four years of intensive study, I then was given the assignment of grapefruit. That was carried on for a four year period.

Since that time, of course, it has been tangerines, temple oranges, Murcotthoney oranges, tangelos, and at the present time we are working on a specialty fruit known as the Murcotthoney orange.

Q. At some time were avocados added to the list?

A. Yes; prior to 1953 the avocado industry had invited me to appear at their meeting, and we discussed—

Q. Before we reach that, what happened in 1949 with re-
[fol. 6] spect to standards for citrus fruits?

A. Well, in 1949 the Governor of the State of Florida appointed an Advisory Committee to draw standards for citrus fruits. The data that I had accumulated during past years became the basis of this code, and it was incorporated into State Law, and became known as the Citrus Code of 1949.

I happened to be upon that Advisory Committee, and I have been on the Advisory Committee up until the present time.

Q. You say the research data that you had gathered was used in formulating this standard?

A. It was the basic information upon which the citrus code presently is used.

Q. What official recognition, if any, was given to you for that work?

A. Well, during recent years I have received recognition; I have received a merit award from the Department, which carries a cash award, and I have also received from the Secretary of Agriculture Superior Service Awards.

Q. I believe you started to say that in 1953 you turned your attention to Avocados?

A. Well, the industry, knowing that we had worked out rather satisfactory information—

Mr. Fourt: May it please the Court, Counsel is now getting into hearsay.

[fol. 7] Judge Goodman: I think the question calls for a direct answer. Read the question again, please.

(Question read by reporter.)

Judge Goodman: You can answer that yes or no.

A. Yes, in 1953 we did do work on avocados.

Mr. Ferguson:

Q. When and how did this research begin?

A. The industry petitioned the Secretary of Agriculture that we do work on avocados, so during the course of the 1953-54 season we did considerable work at the Orlando station with fruits that were taken from the other parts of the State, the rest of the State.

Mr. Fourt: May it please the Court, may we ask the witness a question to see whether he knew of his own knowledge where the fruit was taken?

Mr. Ferguson: I don't think the witness should be interrupted by counsel with what is in effect cross examination. This witness is here as an expert and we can show his qualifications by his training and experience. That is the only purpose, and it has been done, and now we will go on to ask him what he did about avocados.

Judge Goodman: Well, he didn't get a chance to finish his answer to the question, Counsel.

Mr. Fourt: I apologize, your Honor.

Mr. Ferguson: He is telling us what he did, and how it [fol. 8] came to be done.

Judge Goodman: He wants to know what work you did with avocados.

A. Well, during the 1953-'54 year we ran ripening tests at Orlando on seventeen varieties of fruit coming from 37 different groves, 200 lots of avocados were tested, and an individual study made of over 3000 individual producers as to the maturity, the ripening and the palatability of the fruit.

Mr. Fourt: May it please the Court, may we, for the purposes of our motion, move to strike that portion of his answer referring to the source of the fruit, and ask that we be able to ascertain from the witness if he knew personally where the fruit was picked?

Judge Goodman: Well, you can do that on cross examination.

Mr. Fourt: Thank you, your Honor.

Mr. Ferguson:

Q. Now, was anybody else engaged then in the study of the maturity and quality of Florida avocados?

A. Prior to this time Dr. Harkness has been carrying on—

Q. Is that Dr. Roy L. Harkness?

A. Yes, Dr. Roy Harkness of the Experiment Station at Homestead had been conducting studies on avocados with regard to oil. We—

[fol. 9] Judge Goodman: Well, now, ask him another question.

Mr. Fourt: At this point we enter our objection as the record goes along? I am afraid if we do not, at some later proceeding, if there are no objections it will appear that we waived them.

Judge Goodman: Of course you have the right to.

Mr. Fourt: We move to strike then that portion of the answer referring to what Dr. Harkness did or said he did, unless he knows of his own knowledge.

Mr. Ferguson: All he said was that he was engaged in studies. Dr. Harkness has testified in this case, and his deposition is a part of the record.

Judge Goodman: Is that one of the depositions?

Mr. Ferguson: Yes, a very important deposition.

The Witness: The reason I am bringing this out is the fact—

Judge Goodman: If you are going to have this witness refer to what somebody else did and the testimony is in there—you say his deposition is in evidence.

Mr. Ferguson: I am not going to have him testify to what Dr. Harkness did. I just have one little point here to make, and that is the next question.

Judge Goodman: Well, suppose you ask the next question.

Mr. Ferguson:

Q. Was there any interrelation or cooperation between the work done by you and your associates and the work [fol. 10] done by the University of Florida by Dr. Harkness?

A. The Department of Agriculture has a memorandum of understanding with the University of Florida, which includes the maturity and ripening of avocados, and that has been in force since those early days.

Mr. Fourt: If the Court please, we move that the answer be stricken as not responsive.

Judge Goodman: The answer may go out. He wasn't asked about any understanding. You asked him what he did, Counsel, if I remember correctly. What did you do?

Mr. Ferguson: Yes. I asked you if there was any interrelation or cooperation between you.

A. Yes, there was an interrelation. Samples of fruit that were tested at Orlando were picked by Dr. Harkness, and half of the random samples were sent to Orlando for testing for maturity, as judged by palatability and ripening methods. The other half of the samples were retained by Dr. Harkness for oil determination.

Mr. Fourt: If the Court please, we move to strike that portion of what Dr. Harkness did on the grounds it is inadmissible hearsay. The witness, not being a first hand witness, is not privileged to make the statements.

Mr. Ferguson: All he said was that he gathered some samples from Dr. Harkness. That is all he said.

The Witness: During the course of the year I received [fol. 11] 200 samples from Dr. Harkness.

Mr. Ferguson: That is all he said about Dr. Harkness.

Judge Goodman: I will overrule the objection. Go ahead.

Mr. Fourt: Thank you, your Honor.

Mr. Ferguson:

Q. Doctor, in the 1953-'54 season what facilities and help did you have for the avocado research that you conducted?

A. The reason for conducting the work—

Judge Goodman: Pardon me. Judge Bone probably does not have as much experience as we have on this, but after you have listened to about a thousand expert witnesses you begin to get a little bit impatient when they don't just answer the question but start to make speeches or something. I am not saying that with any discourtesy to you, but try and make your answers brief and answer the questions.

The Witness: I will do that, sir. Would you ask me the question again?

Judge Halbert: Read the question, Mr. Wight.

(Question read by reporter.)

A. I have very fine storage rooms at the Orlando station and all the necessary equipment for conducting laboratory work at that station.

Mr. Ferguson:

Q. Now, you made some statement before in a general way about what you did in respect to Avocados in the 1953-'54 [fol. 12] season. In that connection did you formulate a grading system, a score card for maturity and quality of fruit to be tested?

A. It was necessary to do that before we even started our tests, so I did devise a score card.

Mr. Ferguson:

Q. Now, try to follow Judge Goodman's suggestion.

A. I will do that.

Q. The question calls first of all for a yes or no answer and then your explanation.

A. The answer is yes.

Q. And you have that with you?

A. I have that with me.

Q. Well, we will defer that for a moment. Now, this score card is for what purpose?

A. The score card is really to evaluate the maturity and ripening. In other words, it is based on when fruit is mature or palatable, and when fruit is of high quality.

Q. How is this score made up? Who does it?

A. The score is made up by the taster evaluating the fruit on the basis of whether it is green, and by green it means a grassy, bitter, or unpleasant affer taste, unpalatable, rubbery and too soft texture, and does not meet consumer acceptance.

The second category is unpalatable but still watery, [fol. 13] slightly bitter, slightly unpleasant after taste and rubbery to touch, does not meet consumer acceptance.

The next category is the category of palatability, and then the avocado is rated as smooth, mellow, watery and satisfactory flavor, firm, soft texture, and meets the minimum standards of acceptability.

Prime quality is one of excellence, and by that we mean a smooth, mellow, tasty, rich, nutty, with quality of distinct excellence and buttery texture, and this type of fruit is rated as excellent. In each of these categories the taster was to give a numerical code based on this. For instance the first for green he would rate it from 50 to 59. If it was unpalatable he would rate it as 60 to 69. If it was palatable, in other words, it met minimum standards, he would rate it from 70 to 79. If it was excellent, it was a question of rating it from 80 to 100.

Q. I take it from what you said you first established a panel of tasters?

A. We did have a panel of tasters.

Q. Is the use of a tasting panel standard procedure in research on maturity and quality of fruits in other industries?

A. The tasting panel is a very, very common way evaluating fruits. We have used it in connection with our citrus. It is used throughout the country pretty largely for evaluating quality.

[fol. 14] Q. Doctor, will you please tell the Court just what is meant by "mature" and "immature"?

A. That is a question that food technologists have been working on for many many years. We have defined in our work, and it has received general acceptance, that the term "immature" refers to adolescent fruit, or fruit not fully developed. The taste or flavor is green, grassy, slightly bitter, flat, watery, with an unpleasant after taste. It is unpalatable, with a soft, rubbery texture, frequently the fruit shows shrivel during the period of softening, the flavor and texture of the flesh does not meet minimum standards of acceptability by the consumer. And that is a general horticultural definition of the avocado. It applies in many respects with other fruits.

Fruits that are not palatable are regarded as unsatisfactory and immature.

The question of maturity refers to that stage of development of the fruit that when held under suitable conditions it will soften and ripen to be of acceptable eating quality. The taste or flavor of the edible fruit is smooth, watery, mellow or dry, satisfactory flavor, it is palatable and when ripe is soft to firm, the flavor or texture of the flesh meets or exceeds the minimum standards of acceptability.

Mr. Fourt: May it please the Court, the witness was reading from a document. May I see the document?

[fol. 15] Mr. Ferguson: Certainly.

The Witness: Yes.

Mr. Ferguson: We will offer it.

The Witness: I would like to go on to the next point of this, and then I shall be glad to turn this over.

Judge Goodman: Ordinarily we always allow all counsel to see the notes.

Mr. Ferguson: I have given counsel a copy.

Judge Goodman: I take it these are some definitions that he is reading?

A. The question of prime quality—

Judge Goodman: Wait just a minute, please. What is bothering you, Counsel? Why do you want to see it?

Mr. Fourt: That he is not testifying apparently of his own knowledge, he is reading from another document. This is an improper endeavor to prove secondary evidence.

Judge Goodman: You can examine him as to what the document is that he was using, if you want to do that, now.

Mr. Fourt: Yes. If the Court please, in order to preserve our objection, may we move to strike that portion of the testimony which he was reading from the document?

Judge Goodman: We will reserve ruling on that. Let's find out what the document is. You may examine him on that if you wish.

Mr. Ferguson: The document is his own writing, it is [fol. 16] his own writing.

Judge Goodman: Well, ask him what it is. You develop it.

Mr. Ferguson:

Q. What are you reading from, Dr. Harding?

A. This is a definition that I have devised and that I will publish in our technical bulletins, and I have brought this out in other publications.

Judge Goodman: These are your own notes, then—

A. That is right.

Judge Goodman: —pertaining to the subject?

A. That is right. It appertains to—

Judge Goodman: Well, I just want to know what it is.

The Witness: All right.

Mr. Fourt: Thank you, your Honor.

The Court: Is that satisfactory?

Mr. Fourt: Yes.

A. I would like to explain—

Judge Goodman: Well, I don't think there is any question now.

Mr. Ferguson: Well, I don't know whether he was interrupted or not. Have you finished your definition?

A. I would like to bring out the third one, this is important, it is quite important. This is a question of prime or excellent fruit, and the term "prime quality" refers [fol. 17] to the fully developed stage of development of the fruit and to its prime eating condition. It is that stage of ripeness when the fruit reaches perfection in taste and texture. The taste and flavor is smooth tasting, nutty, buttery and quality of distinct excellence. The consumer acceptance of such fruit would be rated prime or excellent.

Q. Doctor, directly under what division of the United States Department of Agriculture is that research work conducted?

A. My particular branch is known as Horticultural Crops. It is also within the Agricultural Marketing Service of the United States Department of Agriculture.

Q. And do you submit all of your data to other officers in the Department, or to whom do you submit it?

A. All annual reports, all projects are closely correlated with our Beltsbill in the Washington office. In other words, the research center. All the reports are cleared there and approved by top officials, and in the case of publications edited. So our officials do know the progress that is being made in all of the work, and they approve it.

Q. And what records do you keep in your research on avocados in particular, what records are kept?

A. Very, very careful records are maintained.

Judge Goodman: Well, what kind? You see, you are deciding the case for us, Doctor. It is not a question of what you consider your records are, but just answer what kind of records are kept. Can you answer that?

[fol. 18] A. This is a sample of the record book that is kept. I have about a dozen of these on avocados, and this is the type of record book that is kept, with the index showing the varieties and the pages showing the various picking dates. This particular record that I open up at any place

will show the date of picking, the date the fruit was placed in the storage room or the ripening room, it will show the temperature, it will show the date tested, it will show that the fruits are all analyzed as individual fruits. It will show the average weight on arrival, the average weight when it came out of storage, it will show the average loss in weight and it will show the diameters and the palatability. It is a complete record of each individual fruit.

By Mr. Ferguson:

Q. In each test?

A. In each fruit in each test.

Judge Goodman: Mr. Ferguson, I think the Court is interested in getting down to the precise question in this case. It may be interesting to hear about how these records are kept and so forth, but these are all time-consuming matters. If you can get this witness on the stand to give some opinion with respect to the oil content of avocados in relation to California avocados—

Mr. Ferguson: Certainly.

Judge Goodman: I think you have sufficiently qualified him. Why don't you get down to that?

[fol. 19] Mr. Ferguson: Well, this is going further. This is producing records of tests. We will have to go to those records to get to the question of the oil contents in relation to maturity. It cannot be answered in one question. It can only be answered by a volume of data, and I propose to offer some of this material in evidence; but I must qualify it first to show how it came into existence and show what records were kept.

Judge Goodman: Would you object if I asked a few simple questions?

Mr. Ferguson: Not at all. I would welcome it.

By Judge Goodman:

Q. Have you made any study or examination of avocados in Florida with respect to the question of oil content?

A. We have, sir, yes.

Q. What was the nature of those investigations?

Mr. Ferguson: That is what I am asking about.

Judge Goodman: You didn't ask him that.

Mr. Ferguson: I am going to ask him it year by year.

Judge Goodman: I don't think we want to spend that much time on this case here.

Mr. Fourt: Your Honor, may I say this; may I say something?

Judge Goodman: We are not interested in a long technical explanation of every step that this witness took in the matter. What we want to find out is after his inves- [fol. 20] gation what has he got to say as a result of his investigation upon this question of the oil content of avocados, which I presume is why you put him on the stand.

Mr. Ferguson: Well, that is, of course, correct, but it isn't the whole story. We show that as a result of studies finally regulations were made by the Secretary of Agriculture, which would have no meaning unless the Court knew the basis. We will show that those regulations are of their nature regulations which will result in the marketing of mature fruit of proper quality. It cannot be shown in one sentence. I want to say this, your Honor.

Judge Goodman: Well, all right, let's get on with the evidence.

Mr. Ferguson: I beg the indulgence of the Court. I want to make a proper record in this case. This case is important. It has decided already a jurisdictional question which was never before decided by the Supreme Court of the United States. The case is even more important because it is a case of vital importance under the Commerce clause of the Constitution of the United States. I submit, your Honor, it cannot be answered in one question.

I think I should have the right to make the kind of record that I think is necessary to present the Plaintiff's case.

I am not taking a long time. I will be through with this witness in not too great a time and give him the opportunity [fol. 21] to show this research, and then your Honors can see that alongside of the regulations, and how they came to be made and what they represent, and what is the effect of the regulations. And then on the other side—

Judge Halbert: Mr. Ferguson, might we just say a word or two, please?

Mr. Ferguson: I beg your pardon.

Judge Halbert: Mr. Ferguson, if this regulation has been promulgated by the Federal Government, isn't it binding upon us? It doesn't make any difference whether it is founded upon sand or upon steel and concrete.

Mr. Ferguson: That is true.

Judge Halbert: Well, why go into all this background, then, if that is binding upon us?

Mr. Ferguson: Because your Honor must understand the nature of the regulations in order to determine whether there is any merit in this defense that the standard imposed by California is comparable with the standard imposed by the National Government.

Now, if I say so, that isn't enough. If I say so that is not enough, but I assure, your Honor, that the body of evidence that we will produce through this witness will well satisfy the Court on the basic question of this case.

Judge Bone: Mr. Ferguson, is there a contention in this case of any sort that this Federal regulation involved here, Order 60—is that the number—was made and goes outside [fol. 22] the orbit of the statute on which it is grounded?

Mr. Ferguson: A defense was permitted to be filed over my objection which challenged the validity of the regulations made under the statute. I objected to—

Judge Bone: Has the objection been made that the regulation is invalid authorizing the Department to make the regulation?

Mr. Ferguson: Such a defense was included over my objection and I think my objection was good.

Mr. Fourt: We will withdraw that defense, your Honor.

Judge Bone: What is that?

Mr. Fourt: We will withdraw that defense in the Answer.

Judge Bone: In other words, you are not asserting here for California that the regulation goes outside the underlying statute?

Mr. Fourt: No, your Honor.

Judge Bone: That it is authorized by that statute?

Mr. Fourt: That is correct.

Judge Bone: Then the regulation authorized by statute you say is binding on this Court or is not binding, as Judge Halbert suggests.

Mr. Fourt: Yes, it is, and the best evidence of the ... of the regulation is the regulation itself.

Judge Bone: We are thoroughly familiar with the ... eral doctrine that regulations made in course of the Stat... [fol. 23] have the effect of law.

Mr. Fourt: Yes, your Honor.

Judge Bone: Like the regulations of these Federal Cour... under which you gentlemen operate.

Mr. Fourt: Yes, your Honor.

Judge Bone: All right.

Mr. Ferguson: Well, that is out of the way. Now, the... is still to be understood the nature of this regulation, h... it comes to be made, so that your Honors can match ... against what the defendants say is a proper regulation ... be superimposed by the State of California under the poli... power. So you have to look into both standards.

Judge Goodman: Well, you are arguing again now, Mr. Ferguson. Your opponent has just conceded that the Fed... eral regulation is under the authority of a Federal statu... and that it is binding upon this Court. Now if there ... something in that that you want to have your witness ex... plain as to what it means and as to what its effect is, tha... is another question; but I don't think it is necessary for you to engage in a long examination of this witness to sho... all the data that was compiled preparatory to the adoption of this regulation.

Mr. Ferguson: It isn't for that purpose, your Honor. I... is to enlighten the Court about the nature of the regulation so that the Court can understand the nature and effect of [fol. 24] the standard imposed, and then consider the que... tion whether it is consistent with that regulation to let the State of California superimpose a different regulation.

Judge Goodman: There is nobody stopping you fro... doing that.

Mr. Ferguson: That is all I want.

Judge Goodman: You go ahead with this witness.

Mr. Ferguson: I wasn't paying any attention to that de... fense because the law was so clear, as stated by his Honor.

Judge Goodman: All right, go ahead.

Mr. Ferguson: I will not take an undue amount of time, but—

Judge Goodman: Nobody is objecting to your taking the appropriate time to present your case, but you were going into an area that did appear to us to be entirely unnecessary.

Mr. Ferguson: Well, I would like to direct the thought—

Judge Goodman: There is already a regulation of the Federal Government in existence, which your opponent concedes is promulgated pursuant to the authority of the Federal Statute, and it is binding. Now, why don't you go on from there?

Mr. Ferguson: The argument was made this morning that there is—

Judge Goodman: Well, please, let's not argue any more. [fol. 25] Ask the witness more questions.

Mr. Ferguson: I would not argue, but there was an objection made to which I was trying to respond.

Q. You were telling us about your records, and the first record is this book in which you kept a record of the tests?

A. Yes.

Q. And you say you have about a dozen of those, is that right?

A. There is about a dozen books like that.

Q. And then from time to time you and your assistants made summaries of the data, annually or at other times?

A. Some reports, of course, have to be turned in every year, and submitted to the department, to the Secretary of Agriculture, and also to the National Citrus Advisory Committee.

Q. Are they sometimes published?

A. The annual report is more or less confidential, although it is acceptable, copies are given to the Advisory Committee.

Q. Are some of the summaries published?

A. Yes, the summaries are published in both reports.

Q. I will remind you that in 1953 a proposed marketing agreement for Florida avocados was presented to the Secretary of Agriculture:

Mr. Fourt: If the Court please, we will again object to Counsel speaking rather than asking a question. We feel it will be much quicker and acceptable to ask questions.

[fol. 26] Mr. Ferguson: I will ask the question, but there has to be a special way of asking—

Judge Goodman: Counsel, will you please proceed to ask your question?

By Mr. Ferguson:

Q. I call your attention to the fact that the marketing order refers to a hearing, a public hearing to be held in Homestead on March 8th to 11th, 1954. Now, did you participate in that hearing?

A. I participated in that hearing.

Q. In what manner?

A. I presented the information—

Judge Goodman: I will sustain an objection to this as immaterial.

A. I presented the—

Judge Goodman: Just a moment. I will sustain an objection, even though it hasn't been made. This is immaterial. We are not concerned with what this witness did in 1954, participating in any hearing. Now let's get down to the question involved in this case.

Mr. Ferguson: If the Court please—

Judge Goodman: There is no use arguing about it, Counsel. The Court has ruled on it. Ask another question. Please proceed.

By Mr. Ferguson:

Q. Did you—

Judge Goodman: Judge Halbert suggests this might be an appropriate time for all of us to relieve our feelings by [fol. 27] taking a recess for lunch.

Mr. Fourt: May it please the Court, may we renew the suggestion that if this is the type of testimony to be made that they are not going to be able to show a case in equity before the discretionary jurisdictional Court and that the three Judges need not hear this testimony today and tomorrow and tomorrow and tomorrow?

Judge Goodman: Well, I don't think it is going to last that long.

Mr. Fourt: Thank you, your Honor.
Judge Goodman: We will recess until 1:30.

(Thereupon a recess was taken until 1:30 P.M. of this date.)

[fol. 28]

AFTERNOON SESSION

February 7, 1961. 1:30 P.M.

Mr. Fourt: May it please the Court, we have placed on the Clerk's desk and given to counsel a memorandum re substitution. We ask permission to file it with the Court.
Judge Goodman: You may.
Mr. Fourt: Thank you very much.

PAUL LOUIS HARDING, resumed the stand and testified further as follows:

Mr. Ferguson: Will you mark this Plaintiff's Exhibit 23 for identification?
Judge Goodman: What is it? You want an identification number for some document?
Mr. Ferguson: 23.
Judge Goodman: One. It should be one.
Mr. Ferguson: No; we have 22 already. This should be 23.
Judge Goodman: We have no exhibits marked in evidence yet.
Mr. Ferguson: Well, it would conflict with the numbers that appear in the record already. I think it would be more convenient to go on with that number series.
Judge Goodman: These are exhibit numbers of documents in the deposition?
Mr. Ferguson: Yes, your Honor.
[fol. 29] Judge Goodman: I suggest again to you, Counsel, to offer your depositions in evidence, and then we will have a record of them. Don't you want to do that?
Mr. Ferguson: Certainly I do. I just question as to the time as to when.
Judge Goodman: Well, we will make the time right now. Just offer them in evidence, what you want, and then we

can get the next exhibit number. The depositions are all together, are they?

Mr. Fourt: We object, your Honor, and we respectfully ask permission and request they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay.

Judge Goodman: We will mark—do you wish to have the depositions marked?

Mr. Ferguson: Yes, your Honor.

Judge Goodman: We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them.

Mr. Fourt: Thank you very much.

Judge Halbert: In other words, all objections will be reserved.

Judge Goodman: All objections will be reserved.

[fol. 30] Mr. Fourt: Yes, your Honor.

Mr. Ferguson: I should like to call the Court's attention to the fact that our last number is 22, so this will be 23.

Judge Goodman: All right, No. 23 for identification is a document you are now offering.

(A document entitled "Score card for testing taste or flavor of avocados" etc. was marked Plaintiff's Exhibit No. 23 for identification.)

By Mr. Ferguson:

Q. Dr. Harding, I show you the folder marked Plaintiff's Exhibit 23 for identification. Will you look at it and see if you have another copy of this folder?

A. I have a copy of that.

Q. Directing your attention to the contents of this folder, page 1, "General information on avocado research, 1953-'54," and page 2, "Varieties and sampling, 1953-'54," and the next page, "Score card for testing taste or flavor of avocados," that you have already read, have you not?

A. I have.

Q. And then a printed article or statement entitled "The relation of maturity to quality in Florida avocados," and

then "Evidence presented at hearing with respect to proposed marketing agreement of Florida avocados, March 8, 1954," and a statement entitled "Maturing, ripening and softening of Florida avocados," on page 9 through 12, and [fol. 31] then a set of exhibits attached to this statement.

A. That is right.

Q. Is this the matter that you presented at the hearing at Homestead on March 8, 1954?

A. In general, yes. The part—there are two separate parts—

Judge Goodman: Counsel, I am going to interrupt you again. Counsel, your opponent once before objected to this. The Court regards this as entirely immaterial and irrelevant. We are not required in a three-Judge Court hearing in which is involved the validity of a State Law to hear all kinds of evidence as you would if you were trying a case before a Jury or an ordinary civil action. Only such evidence as is necessary to determine the question of the invalidity of the statute is all we need to hear.

Mr. Ferguson: That is all—

Judge Goodman: Otherwise you will keep us here, I can tell from your trend, for days and days hearing everything that was done by this witness in the performance of his duties as a representative of the Department of Agriculture in Florida, and we just don't propose to hear that.

If you want to get an opinion from him on a matter that is material to this case, of course, the way is open to do that. We are not going to encumber the record with things like this. So I will sustain the objection that was made to [fol. 32] this exhibit. It may continue to be marked for identification as Exhibit 23.

Mr. Ferguson: I haven't offered it yet.

Judge Goodman: I thought you had.

Mr. Ferguson: I have to lay the foundation for the offer.

Judge Goodman: Well, you asked him whether or not this was material that he used in the presentation.

Mr. Ferguson: That is one question.

Judge Goodman: Well, I sustained the objection.

Mr. Ferguson: Your Honor, may I make a statement by way of supplementary opening statement, and I think that

accounts for the difficulty here, that the nature of this regulation by which maturity of Florida avocados is determined is the setting by the Secretary of Agriculture of dates upon which avocados which have attained a certain weight or size may be picked and shipped.

It is important to the determination of the ultimate question in this case to ascertain that this is a regulation which establishes maturity, and a regulation by the Federal Government which precludes the imposition of a different kind of regulation by a State Government.

It is necessary, your Honor, to have data here as to the relation between these picking dates and oil content so the Court can see that these avocados are mature by compliance with the regulations of the Secretary of Agriculture [fol. 33] without attaining 8 per cent oil content. That is absolutely necessary for us to show.

Judge Goodman: Well, Counsel, can't you ask your witness that question? And if the other side thinks it is not correct they have an opportunity to cross examine. It isn't necessary, once you have qualified an expert that he has to tell every step that he took in connection with the matter. Just have him give his opinion. I have told you that before. That stands then as prima facie evidence until the other side in some manner breaks it down on cross examination.

Mr. Ferguson: I say that there must be before the Court a record which shows that at these picking dates the avocados have not attained the 8 per cent oil content. The witness could not just say that in one sentence to cover all avocados in Florida.

Judge Halbert: You said that in one sentence, Mr. Ferguson. Why can't he say it in one sentence?

Mr. Ferguson: There would be no evidentiary support for his statement. He can only say—

Judge Goodman: Well, Counsel, I am sorry to interrupt you, but I have been twenty years on the District Bench and I have heard experts by the hundreds testify, and it is not necessary, and it is the law in Federal Courts that it is not necessary to do anything more than to just qualify your expert and have him give his opinion, and you don't [fol. 34] have to have him tell, if he is testifying as to value.

all the houses that he looked at or all the rest of the things that he did, because that is unnecessary, unless the other side wants to cross examine him to see if his opinion is any good or not.

Mr. Ferguson: I do not—

Judge Goodman: We are not going to permit it, Counsel, so you might as well make up your mind about it, and not argue about it. You ask the witness what his opinion is. I am sure he won't have any difficulty in expressing his opinion. He is very voluble. You just ask him what his opinion is with respect to the manner in which this is done in Florida, and that is all you have to ask him.

Now please proceed along those lines and don't take up any more of our time on this.

Mr. Ferguson: Well, your Honor, I do wish to identify the documents and to ask the questions which I think qualify them as evidence, and then, of course, I will abide by whatever ruling the Court makes.

Judge Goodman: It wouldn't mean a thing to us, Counsel, unless you have got the opinion of an expert on the thing. Documents are not per se admissible. They are not official records—

Mr. Ferguson: They are official records.

Mr. Goodman: They have not been identified as official records.

[fol. 35] Mr. Ferguson: That is exactly what I want to bring out, your Honor. It would just take two or three questions to do that, to qualify them.

Under both Section 1732 and Section 1733 of the Judicial Code—Section 1733 (b), "Copies or transcripts of any books, records, papers or documents of any department or agency of the United States Government."

Section 1732: "Records made in the regular course of business."

And, of course, there are ample authorities. And these qualify under both sections.

Judge Halbert: Mr. Ferguson, may I ask you a question: What do you propose to prove by Dr. Harding? I don't want a long dissertation, I just want a succinct statement as to what you propose to prove by Dr. Harding.

Mr. Ferguson: I propose to prove that regulations under which these Florida avocados are permitted to be picked and shipped are of their nature and by scientific research established as assurance of maturity and quality, and that the compliance with these regulations and permission to ship pursuant to these regulations is obstructed by the State of California by the imposition of another standard which is foreign to this fruit as a test of maturity.

Judge Halbert: Well, reversing the statement that you made there, I take it that you ask Dr. Harding to give an [fol. 36] expert opinion as to the very thing that we are called upon to decide here, whether or not these regulations do, in truth and in fact, impinge the Constitution.

Mr. Ferguson: Oh, no.

Judge Halbert: But aside from that, going back to the first, why can't we get to that very question? The State's attorney here has withdrawn any claim that there is anything irregular from a legal standpoint so far as this regulation laid down is concerned. Why can't the regulation be produced and why can't Dr. Harding be asked if in his opinion as an expert that is a sound basis for the selecting and shipping of avocados, and then we have got what the issue is about in the matter. But what he did—well, it starts away back in 1935, what he did with oranges, and so forth, and I don't think that that has any bearing at all on the case here.

Mr. Ferguson: That was only done to show that he has had experience in the matter of the establishment of standards on maturity and quality.

Judge Halbert: Well, nobody questions that.

Mr. Ferguson: And we have shown that he has spent years in research on the avocado, the same objective.

Judge Goodman: Well, why can't you show him a Federal regulation and ask him whether the avocado raised in Florida which he has been inspecting and serving all these years, whether or not the avocado there raised and shipped [fol. 37] complies with the Federal regulation and is fit to ship out of Florida? Why can't you ask him that question? Why do you have to ask him anything else?

Mr. Ferguson: May I offer a suggestion to short-cut the examination? I have asked to have marked this folder and

its contents as Plaintiff's Exhibit 23. I will now ask to have marked another folder which summarizes the work done in the next year, 1954-'55, as Plaintiff's Exhibit 24 for identification.

Then, in the next year, 1955-'56, Plaintiff's Exhibit 25 for identification.

Q. There is one more, is there not, Doctor, one for three years together?

Judge Halbert: Mr. Ferguson, aren't you just in effect offering the Congressional Record to establish the fact that a law has been passed by Congress and we haven't any choice in the matter, we have to accept what is produced to us, what the law is?

Mr. Ferguson: If the Court wants to enter a judgment to that effect I would be well satisfied.

Judge Halbert: That is not what I said. In other words, there is a law presented to us here and you want to throw the whole Congressional Record in to show the history and background of the law, to show that it was a just and proper law, and we haven't any choice in the matter.

[fol. 38] (Further argument between Court and Counsel.)

Judge Bone: I want to know what the witness thinks about Florida avocados, whether they are in full compliance with the requirements of this regulation. Now, is there any reason why he shouldn't answer that?

Mr. Ferguson: None whatever.

Judge Bone: I don't want to sit here all this week with a lot of unanswered questions that seem reasonable and rational. I wonder if the witness thinks that that question is entirely out of order?

By Judge Bone:

Q. You can express an expert opinion. Do Florida avocados comply with that regulation? I mean the avocados that are shipped into California?

A. The avocados that are shipped out of the State—of course we don't know where they go to—

Q. But to the best of your knowledge, the avocados that are shipped out?

A. The avocados that are shipped certainly meet the consumer acceptance and are palatable.

Q. Do they comply, in your judgment, with the requirements of that regulation?

A. I think they do comply.

Q. You say you think they do?

A. I say yes.

Q. That is your honest opinion about it?

[fol. 39] A. Yes.

Q. That they comply in full with the terms of that regulation?

A. That is my opinion.

Judge Halbert: Dr. Harding, let me ask you a question based on what you said a moment ago.

Do you mean that these avocados are not required to meet this Federal regulation before they are allowed to go out of there?

A. No, I don't. I mean that they must meet Federal regulations of the Marketing Agreement.

Judge Halbert: That is what Judge Bone asked you and you answered—

A. I didn't understand it that way.

Judge Bone: It may be that I am somewhat crass and crude and barbaric and even uncultured, but I asked you if avocados raised in Florida and shipped out lawfully conform to the requirements of this regulation. Now do you understand that question?

A. Yes.

Judge Bone: I will write it out, I will go out and write it out and make it very simple so even Judges and lawyers can understand it. I realize that maybe we are a little confusing in the way we go at things.

Judge Halbert: Well, that is a fact, isn't it, Dr. Hard-

[fol. 40] ing, that these avocados have to meet this Federal regulation before they can be shipped out?

A. They all have to be inspected and carry a certificate saying that they—

Judge Bone: That isn't the answer I want. Do they conform to the regulation?

A. Yes.

Judge Bone: Just a little three-letter word.

Mr. Ferguson: To comply with the suggestion of the Court, I would like to mark—there is a fourth one, and apparently I haven't got the copy—have them marked for identification and ask two or three questions which I think will qualify them as evidence, and then go on, without going into the contents and detail at this time. There might be a later time when the Court might want to find out about them.

If you will mark these two pages 26, two typewritten pages—

Judge Goodman: What is that, Counsel?

Mr. Ferguson: Two typewritten pages entitled "Resume of Progress Studies of Florida avocado maturity," covering the years 1958-'59, 1959-'60 and 1960-'61.

(The documents referred to were marked Plaintiff's Exhibits 24, 25 and 26 for identification.)

[fol. 41] Mr. Ferguson:

Q. Dr. Harding, let me ask you as to the contents of these folders now marked for identification as Plaintiff's Exhibits 23 and 24, 25, and the two typewritten pages, No. 26. Are these part of the records of the United States Department of Agriculture kept by you in the course of the performance of your duties as an officer of the Department?

A. They are, sir.

Q. With particular reference to the printed reprints taken from the proceedings of the Avocado Horticultural Society, was that submitted in manuscript form which you had prepared?

A. All of the reports that you have there have been submitted and approved.

Q. Including what is printed?

A. Including what is printed.

Mr. Ferguson: Then I would defer the offer of these exhibits at this time, in compliance with the suggestion of the Court.

Judge Goodman: Well, you are just having marked because it is your view that they substantiate the opinion that the witness has given that the Florida avocados comply with the Federal regulations?

Judge Bone: Now what will that exhibit number be?

Judge Goodman: There are four of them, 23, 24 and 25.

Mr. Ferguson: And 26.

[fol. 42] *Judge Bone: Now, we have something that California's Counsel can shoot at, a luminous target. If he fails to hit the bulls-eye I think he is less adroit than I think he is.*

Mr. Ferguson: Look at what is on that table.

Judge Goodman: Do you have any more questions of the witness, Mr. Ferguson?

Mr. Fourt: An inquiry, your Honor: I take it these exhibits are not offered in evidence, they are just marked for identification.

Judge Goodman: They are marked for identification. They haven't been offered yet.

Mr. Ferguson;

Q. Dr. Harding, based on your training, and experience in horticulture and plant physiology and plant chemistry and the research on maturity and quality of Florida avocados, in which you have been engaged since 1953, do you have an opinion whether or not percentage of oil content is a scientifically valid basis for the determination of maturity and quality of Florida avocados?

Mr. Fourt: To which we object that the witness has not been qualified as an expert on oil content. He is a plant physiologist who apparently has been in charge of palatability tasting, and therefore we submit that he is not qualified as an expert to answer this question.

Mr. Ferguson: Palatability tasting is the manner of determining maturity and quality. We have already covered [fol. 43] that.

Judge Goodman: We will overrule the objection on the ground that perhaps it pertains more to the weight of the testimony than the admissibility.

Mr. Ferguson:

Q. Doctor, what is your opinion?

A. We have had a great deal of experience in our laboratories. We have—

Judge Goodman: That is not a statement of your opinion, Doctor. Please give us your opinion.

A. The oil content does not measure—is not directly related to palatability.

Mr. Ferguson:

Q. What do you embrace in the word "palatability"?

A. By "palatability" I mean consumer acceptance, or taste.

Q. And what does that mean as to maturity?

A. When a fruit is mature it is palatable.

Q. Does it embrace maturity?

A. It embraces maturity.

Q. And quality?

A. Yes.

Judge Goodman:

Q. And you say that the oil content is not directly related to the question of maturity?

A. Yes.

Mr. Ferguson:

Q. And what are the reasons?

A. In our tests the oil content varies considerably among [fol. 44] any given lot of avocados picked at any one time, and our tasters have not been able to differentiate or give a preference to the higher oil content or to give a preference to the fruit of low oil content. The individual variations, tasters cannot differentiate that preference.

Judge Goodman:

Q. Is the matter of maturity entirely a matter of tasting?

A. As fruit ripens they increase in palatability, in most cases. They also increase in oil, but within any given period

of picking, where you have a wide range in oil content in every sample, the taster cannot pick out from taste the high oil and the low oil content fruit.

Q. Wouldn't the quantity of oil in fruit have some relation to maturity, just the same as it would in any other, for instance the same as juice would have in the common fruit?

A. Not necessarily, because there are people who do not prefer varieties that are high in oil content, sir.

Judge Halbert:

Q. What is the range in oil content in avocados, Dr. Harding?

A. That is an interesting point that we have dodged around, because of the fact that in Florida we have West Indian varieties, and even when they are very ripe and palatable—

Q. Doctor, I asked you a simple question: What is the range of oil content in avocados? I don't care whether they are in Florida, California, Michigan or South America [fol. 45] or where they are.

A. I would say individual fruits will run anywhere from 1 per cent to 20 per cent.

Q. So that the mean range is from 1 per cent oil content to 20 per cent oil content?

A. In Florida, yes.

Q. No, I am not talking about Florida, I am talking about avocados over all, anywhere. Where would the maximum oil content of avocados be found?

A. I think it would be found in the Mexican type of avocados, and that would run perhaps to 30 per cent oil, or higher perhaps.

Q. Well, I think perhaps I didn't make my first question clear. I meant those avocados that the ordinary person would accept as marketable or palatable, tasty fruit, what would be the minimum of oil content in such an avocado as that? I suppose when they are very green there is very little or no oil content?

A. By "green" you mean immature?

Q. Yes.

A. I started to say that the West Indian varieties are very low on oil content, and they would vary from 3 to 4 or even 5 per cent when they are mature and ripe.

Q. All right. Then is it your statement that the minimum for a ripe avocado would be 3 per cent and the maximum [fol. 46] for a ripe avocado would be 30 per cent?

A. I can't answer the question that way.

Q. Why can't you?

A. Because of varieties which normally don't exceed 3 or 4 per cent. Other varieties go 5 or 6 per cent. Other varieties—

Q. Dr. Harding, I am not talking about varieties, I am talking about an avocado that is ripe, the least amount of oil that you would find in such an avocado, I don't care where it comes from, what kind it is, its size, shape, color or anything else.

A. If you are talking about the minimum I would say that avocados are acceptable and palatable at 2 and 3 per cent as a minimum.

Q. All right. Now, what is the maximum that avocados may contain and still be marketable and palatable?

A. I have only experience in Florida, therefore I can answer your question somewhere around 15 to 20 per cent.

Q. Do I understand then that you do not purport to be an expert on any avocados except those grown in Florida?

A. My experience is with Florida avocados, sir.

Q. Do you or don't you know anything about California avocados?

A. I am familiar with them, yes. I have not run any tests, however.

Q. I am not talking about tests. Doctors have opinions about lots of illnesses that they have never had, and you, [fol. 47] as an expert, I suppose, would have an opinion from your studies rather than actual experience. You said a few moments ago that avocados might have as much as 30 per cent of oil in them. What avocados did you have in mind when you said that?

A. The Mexican type.

Q. Have you actually had this experience or are you telling this from your study?

A. You asked me for my opinion and I base it on the reading I have done.

Q. In other words, it is from your studies as distinguished from actual experience?

A. That is right.

Q. So that we have a minimum range of from two to three per cent in certain avocados that come from the West Indies, did I understand you to say?

A. That is right, sir.

Q. To a maximum around 30 per cent for avocados that come from Mexico?

A. That is right.

Q. So Florida and California are probably in between somewhere, or do you have an opinion on that?

A. Yes, I have an opinion, because our early varieties are the West Indies. This is followed by the hybrid types which are West Indian and Guatemalan types, and then we [fol. 48] have a few straight Guatemalan varieties. We do not raise any commercial lots of the Mexican type.

Judge Bone:

Q. What does a Florida variety derive from, Doctor?

A. I didn't hear the question, sir?

Q. What does the Florida variety derive from? What sort of ancestor did it have?

A. A number of our summer varieties are all West Indian varieties.

Q. That would include the Florida variety?

A. Yes. Of course, there is no variety by that time, but the West Indian varieties are summer varieties.

Q. That is the type that flourishes in that particular area of the earth?

A. They do require a warmer temperature, and so far as I know they are not grown commercially on any scale in California, sir.

Judge Halbert:

Q. What is the maximum amount of oil that you find in the Florida varieties?

A. You are referring now to the West Indian?

Q. No, the ones that are grown in Florida?

A. Sir, our varieties range all the way from the West Indians to the Guatemalan type. We have two races and hybrids between these, and the range, as I said before, would range at minimum palatability somewhere around [fol. 49] 3 per cent up to 20 per cent. You can plainly see that this question of oil is quite an interesting one, because certain varieties are known for their low oil content, and that is the reason I am saying that in any given lot a taster that is tasting a given variety of avocado, 20 avocados, and they may range in oil from 2 to 5 per cent and yet the taster cannot differentiate and show a preference for the 5 per cent over the 3 per cent.

Mr. Ferguson:

Q. Dr. Harding, when you answered His Honor's first question about the over-all range of oil content, you disregarded varieties to start with. Now, approximately how many varieties of avocados are grown commercially in Florida?

A. We have in the Marketing Agreement over 40 varieties of avocados.

Q. How do you express the maturity standard in short form?

A. In short form the maturity standard is based on given picking dates for a variety in conjunction with weight and diameter.

Mr. Fourt: If the Court please, may we move to strike the answer? The best evidence of the regulation would be the regulation itself.

Judge Goodman: Did you put this in terms of the regulation? Would you read the answer?

(Answer read by reporter.)

[fol. 50] Mr. Ferguson: He didn't say anything about regulations.

Mr. Fourt: We understood he was referring to the regulation, and apologize.

Mr. Ferguson:

Q. It is a picking date or set picking date for each variety?

A. Picking date and a given minimum weight and diameter, or diameter for each variety.

Q. That would be a picking date according to the attainment of certain weight or size?

A. Yes, and these picking dates and minimum weights are based on palatability or taste.

Q. Now, which are leading avocados of the West Indian race?

A. Waldin and Pollock.

Mr. Fourt: If the Court please, we respectfully suggest that the witness has not been qualified as a marketing expert. His qualification is as a plant physiologist, and now he is being asked regarding the prominent varieties raised in Florida.

Judge Goodman: Well, he may have that knowledge as a result of his work. Overruled. Did he answer already?

Mr. Ferguson:

Q. You have named the Waldin and Pollock.

A. The two leading ones.

Q. Do those varieties ever attain 8 per cent oil content?

A. Very seldom.

Q. Does the Pollock ever attain that?

[fol. 51] A. Very seldom.

Q. And I should qualify it: Is there a time element?

A. There is another question that enters into it, and that is if the West Indian varieties are left on the trees very long they fall. The become over-mature and they fall.

Q. Were you talking about oil content at the time of picking date?

A. Picking date and maturity.

Q. Picking date and maturity is synonymous, is that right?

A. In connection with weights and diameters.

Q. Now which are leading hybrids, West Indian, Guatemalan, and Hybrids?

A. Perhaps Lula and Booth 8, Booth 7.

Judge Bone:

Q. Doctor, what is the desirable length of time between the picking and marketing? How much in spread in time is desirable to market a good avocado?

A. Well, the West Indian kind, the stay on the tree is very short. I would say the maximum length of picking is perhaps two months, two months and a half at the most. In the case of the hybrid types, and the Guatemalan types, they will stay on the trees very, very much longer, and the marketing period is at least three months, between three and four months.

Q. In other words, you have a period of three or four months in which you can market the product after it is picked?

[fol. 52] A. Oh, no.

Q. That is what I am getting at?

A. Oh, no.

Q. When you pick the fruit off a tree, or wherever they grow, what period can elapse before that fruit becomes spoiled or unsalable?

A. Well, there again I have to call to your attention the West Indian types, probably from the time they are very hard and picked until they are overripe or oversize would probably not be—would be perhaps 10 days at maximum.

Q. That means you have to move that fruit and get it on the market and sold, if possible, within a period of 10 days?

A. Yes, sir, that is right.

Now in the case of the latest varieties of the hybrids that we speak of, perhaps you would have 15 days, but that would be about all. It takes about 7 or 8 days to fully soften an avocado if it is held at fairly high temperature.

Q. I assume it is something not comparable to, but something like a banana. I have seen a train load of bananas that arrived off a ship green, but they are ripened by hanging them up and letting them turn yellow?

A. The avocado fits pretty much in the same category.

Q. In other words, it is the same sort of an animal as the banana?

A. Very much so.

[fol. 53] Q. It matures after it is picked?

A. It softens after it is picked.

Q. Is that a sort of maturing process?

A. An immature or very immature fruit may soften or become rubbery, and it may shrivel, may not even soften at all.

Q. I am intrigued by this word "mature" and "maturity". What does that spell out? If you pick the avocado, but you want ten days for marketing, or two weeks for marketing, what occurs in that period inside the fruit?

A. That is an interesting thing, and we have gone into that rather fully, sir. We have followed the sugar content, we have followed the phenolic compound, which are the bitter or the astringent—

Q. Well, is that a change, the avocado undergoes what you call the maturing?

A. Softening. Some would refer to it as "maturing", but we would refer to it as "softening." And during that time the oil content changes very, very little.

Q. We are going to hear something here about maturity. I would like to know what counsel means by using that expression. It might help some. Does the term "maturity" refer more to the time when the fruit is picked? In other words, if you pick the fruit before it is ready to be softened it would be green in the ordinary sense of the word, and it might not soften and be palatable, and it might, as you say, [fol. 54] shrivel up or otherwise not become a good fruit?

A. Of course, using it in the horticultural sense you are using it correctly. The fruit has to be matured, and it will ripen and develop flavor afterwards; but in some fruits it is as ripe as it ever will be when it is picked. For instance, the orange, it doesn't increase in sugar after it is picked.

Judge Goodman: We are referring only to avocados.

A. Yes. So far as we know the changes that take place are very minute in the case of the avocado other than the enzymitin that develops flavor in the avocado.

Judge Goodman: We will take a five minute recess.

(Recess.)

Mr. Ferguson:

Q. Doctor, you were asked by his Honor to explain more fully the meaning of maturity. Is there a definition in the quality standards?

A. Yes, there is a definition, and—

Q. What page are you looking at?

A. I am looking at page 25.

Mr. Fourt: To which I object, your Honor. Now I believe he is quoting from the regulation. The regulation is the best evidence.

Mr. Ferguson: Wait a minute. This is an exhibit attached to the Complaint, and it is admitted by the Answer and he is simply reading from an exhibit.

[fol. 55] Judge Goodman: Well, we don't have to have him read it. We can read it as well as he can. But what is the question?

Mr. Ferguson: The question is the definition of the word "mature".

Judge Goodman: Does the regulation define it?

Mr. Ferguson: Yes, your Honor.

Judge Goodman: Well then, we can read it. You can call our attention to it.

Mr. Ferguson: Well, I thought his Honor wanted to ask some more questions about it. It is all right with me, either way.

Judge Bone: If you think it is clearly defined in the regulation we can read it.

Mr. Ferguson: I wouldn't know if it is clear. If he reads it and your Honor thinks it is clear—I would rather your Honor judge for yourself whether it is clear and complete. Here is an opportunity to ask this witness.

Judge Bone: Well, there has been a suggestion that the avocado has reached some form of maturity when it is picked, but then it undergoes a certain change like the banana does. It is green when it is picked, and a full grown banana, but it changes its texture and sweetness develops in the body of the banana and the pulp of the banana so that you like to eat it. Now he says that this change in the avocado is somewhat akin in that sort of process to the avocado.

Would you agree with that?

[fol. 56] A. Yes.

Judge Bone: We are not trying to draw a deadly parallel between the two, but it is some sort of process as that that occurs in the avocado.

Mr. Ferguson: In Florida.

Judge Bone: And it would be in the California avocado also, for all I know.

Mr. Ferguson: Oh, yes.

Judge Bone: Well, I guess we have that ironed out.

Judge Goodman: Do you have any other questions?

Mr. Ferguson: Just one more question, Doctor? In these picking dates, aside for the different varieties—I believe you have them here for 45 varieties—do they take any regard whatever of oil content?

Mr. Fourt: To which we object, your Honor. The regulations speak for themselves again. I believe counsel is referring to the Federal regulations.

Mr. Ferguson: They speak for themselves so far as they speak, but I am asking if they include any consideration of oil content?

Judge Goodman: If they do what?

Mr. Ferguson: If they include any consideration of oil content.

Judge Goodman: The regulations, of course, speak for themselves, what they say. If you are asking that sort of a [fol. 57] question that calls for his interpretation of the regulations.

Mr. Ferguson: No, it is not an interpretation, it is a fact.

Judge Goodman: Well, restate your question again, will you, please?

Mr. Ferguson: With the reporter's help.

Judge Goodman: All right, we will have the reporter read it.

(Question read by reporter.)

Judge Goodman: Does who take any regard?

Mr. Ferguson: The dates, the picking dates.

Judge Goodman: It is not very clear. Maybe the witness understands it.

Mr. Ferguson:

Q. Are they to any extent at all based on oil content?

Mr. Fourt: To which we object, that calls for an opinion of the witness and the regulation is the best evidence of the intent of the regulation.

Mr. Ferguson: Here is a witness who has to do with the formulation of these regulations, the adoption of the regulations, and he has done so over the years.

Judge Goodman: I think the witness has already testified —I may be wrong—that there was no change in oil content after the picking date. Isn't that right?

Mr. Ferguson: That wasn't this question.

[fol. 58] Judge Goodman: That is what you said, wasn't it?

A. Sir, let me answer the question. In the Florida regulations—

Judge Goodman: No, I don't want to know about the Florida regulations, we can read that.

A. All right.

Judge Goodman: What we are interested in is your opinion as to the facts. Is there any change in the oil content in the Florida avocado after the picking date, change in oil content?

A. After the fruit is picked there is practically no change in oil content.

Judge Goodman: So the fruit is not picked until it has reached a stage of maturity in which there is already an oil content in the avocado, is that right?

A. The oil content does not change after it is picked.

Judge Goodman: So there is oil in it at the time it is picked?

A. That is right.

Judge Goodman: But the important thing is to pick it at the right time?

A. That is right, sir.

Mr. Ferguson:

Q. Is the time in any way related to oil content?

Mr. Fourt: To which we object—

[fol. 59] Mr. Ferguson:

Q. The picking date.

Mr. Fourt: To which we object. I believe the question again refers to regulations, and the regulation is the best evidence.

Mr. Ferguson: Everything is about the regulations, but the question is what is the nature of the regulation, what is the basis of it?

Judge Goodman: I think he has already answered that question.

Mr. Ferguson: But your Honor's question was a different one, and I am glad you put it; but this is a question whether in the fixing of the picking date any consideration is given to oil content as well as weight and size.

Judge Goodman: You may answer that.

A. No.

Judge Halbert:

Q. Dr. Harding, I have been reading this definition of "mature" here, and it seems to me that it is a philosophical exposition on the subject rather than a yardstick by which one may gauge it. It says, "Mature means that the avocado has reached the stage of growth which will assure a proper conclusion of the ripening process."

A. That is right, sir. I can explain it with other fruits.

Q. All it says is that an avocado which is mature is mature, isn't that what it says?

A. That is right, sir, but in the case of a banana, which [fol. 60] was brought up a little while ago, and in the case of the apple, the fruit contains starch, and during this softening process the starch is changed over to sugar, and therefore the ripening process that you are referring to there is a very radical change. In the case of the avocado the oil content does not increase. In the case of the citrus fruit

the sugar content does not increase. The processes are going on there. The fruit must be mature when it is picked to be acceptable. It doesn't ripen or develop to any degree of quality after it is picked.

Q. Well, what gauge or formula or rule do you have which determines when the ripening process in the avocado is completed?

A. The only means we had was to start in before the fruit was mature, when the fruit which shriveled and would develop poor flavor, and follow it through the season until you reached that point where it would soften to a satisfactory quality.

Q. That isn't the point. I am a stranger and I come down to Florida, and I want to know when there is a completion of the ripening process in an avocado. How do I determine that?

A. Sir, all you have got to do is go to a store and buy an avocado, because they have to meet these regulations, and they would be mature.

Q. You are just talking around in circles now, Doctor. [fol. 61] A. No.

Q. I am talking about—if I want to buy an avocado from a farmer and he says, "Well, go on out there and pick yourself an avocado that has completed its ripening process." How would I do that?

A. I would think that you would have a most difficult time, sir. You might pick a large fruit which was a very late fruit, and you would find it did not ripen or soften satisfactorily, and therefore you would not be happy.

Q. Well, in other words, this definition of mature in here doesn't mean a thing, does it?

A. It means this: That a knowledge must be obtained of the variety in order to pick the fruit at a mature stage.

Q. Dr. Harding, are you telling me that a variety of fruit is like hatching a chicken, that you can depend on approximately 21 days after the hen starts setting on them that there is going to be a chicken come out of the egg or the egg is going to be spoiled?

A. No. But when you have many varieties and they cover a wide range of different kinds, it is most difficult to pick an avocado and know that it will be mature, be-

cause of the type. You have these West Indians, you have the hybrid types, and all these varieties in between, and a knowledge of the varieties, and when they mature, is very important.

Q. But the only yardstick that is laid down in these regu-
[fol. 62] lations that I see is that they must be of certain weight and a certain diameter, and they must be picked between certain dates?

A. That is right, sir.

Q. But it doesn't say that, it doesn't say that; it says that they can't be shipped before a certain date?

A. That is right.

Q. You can pick them any old time you want to as long as you don't ship them before that date.

Judge Goodman: What page are you looking at?

Judge Halbert: I am looking at page 24.

Mr. Ferguson: Your Honor, may I ask a question? Are those words used in the regulations, "picking," and "shipping"?

A. The import of them, yes.

Q. Actually aren't they shipped the same day they are picked?

A. I would think very nearly the same time.

Judge Halbert:

Q. Dr. Harding, you said you had some considerable experience with oranges. Don't you determine when your orange can be picked by the sugar content?

A. Not by the sugar content alone, sir. There is the sugar content, the acid content, the volume of juice, the rind color. There are a number of factors, and all are interwoven, and in order to meet a standard it must be more than one thing, it must be all of them.

[fol. 63] Q. All right. Then I will accept your amendment. But you have have got something that you can put your finger on, that there must be a certain amount of sugar, the orange has to be a certain percentage color, and so forth?

A. Yes.

Q. Well now where, in this regulation, is there anything that even approaches that kind of definition?

A. Sir, I might remind you that in the case of the apple is a good indication like that. Usually it is the number of days from bloom to maturity. In the case of the canteloupe it may be a pressure test, or in the case of apples and pears it is a pressure test. There are a number of ways of judging maturity. This is really a measure of growth, because we are talking about weight, weight of the fruit. So it is really a matter of growth.

By Mr. Ferguson:

Q. I don't think, Doctor, you have got his Honor's question. Let me ask you this: Are these dates fixed in any permanent way, or are they from season to season?

A. There is a certain amount of flexibility, of course, with any marketing agreement. It allows the growers, the shippers, the handlers who are members of this Association, to regulate under the powers of the Department, providing the Secretary approves—it gives them a certain amount of flexibility, which would take into consideration the seasonal [fol. 64] conditions.

By Judge Halbert:

Q. Wait. Now, Doctor, you are getting right back to what I was concerned about here. I, myself, grew up on a farm, and nobody is going to tell me that you can pick oranges on a certain day every year, or you can pick apples on a certain day every year, or you can pick canteloupes on a certain day every year, because it just doesn't happen that way, does it? The average season, it may fluctuate for a great number of days, depending on the season, can it not?

A. There you have brought out a very fine point with the Marketing Agreement. It puts the control, sir, of regulations into the hands of the growers, the handlers, the shippers, and yet having to abide by certain regulations, so that they can't be influenced too greatly by economic conditions. These regulations have to be approved by the

Secretary. They can take in changes as seasons permit. It isn't iron clad.

Q. Well, then, what good are these regulations?

A. They must be approved by the Department of Agriculture, sir.

Q. In other words, the law is all right, except if you get the Secretary of Agiculture to approve it you can violate the law, is that it?

A. No, you cannot violate the law. First of all, the men who are selected I would say are among the very finest type [fol. 65] of men, because they are representatives of the community—

Q. I am familiar with all those things, those marketing committees. As I say, I was born and raised on a farm, and I know that they try to get that kind of people, but the fact remains that what this schedule B says here can be fluctuated by the conditions of a particular year and the conditions that exist that need to be fluctuated to beat the situation?

A. It has a certain flexibility, yes.

Q. All right. Now then one last question and I will be quiet: Is there any reason why the oil content of avocados cannot be used as a yardstick by which to test the marketability of avocados?

A. Sir, I have been testing oil content at our Miami station for the last three years, and the report that you have here is an abstract of that work. The one point I did call your attention to, our tasters could not differentiate high oil from low oil.

Q. I don't care whether the tasters can or not. Is there some reason why the oil content cannot be used as a yardstick the same as the sugar contents is used for the testing of oranges?

A. I suppose you could if you had—say we had 45 varieties, sir, I suppose you could have maybe 30 different oil standards rather than a single one to regulate the whole group.

[fol. 66] Q. That is the very thing I was turning over in my mind here. Maybe the only thing that is wrong is that the thing is too rigid. But can you give me any reason, Doctor, why the oil content could not be used as a yardstick if it was not too inflexible?

A. The first thing I would want to do is to have it related to palatability. That would be one. I would want to have a non-destructive test, if possible, although that would not be essential.

It would mean when you reached the border line, sir, and we will say that we are setting a border line of 4 per cent for Waldin variety, and you say the oil content shall be 4 per cent, let me point out that when you say 4 per cent you have 50 per cent of the individual fruit above 4 per cent, you have 50 per cent of the individual fruit below 4 per cent, you are either saying that those below are not mature and should not be picked, and if they are picked then what are you going to do about them?

Q. What do you do with your oranges that are picked below the sugar content?

A. Sir, the regulations require that they be destroyed.

Q. Well, what is the difference between an orange and an avocado?

A. There wouldn't be any difference sir. The only thing is that the price per piece is quite different.

[fol. 67] By Mr. Ferguson:

Q. It would result that certain varieties would all be destroyed?

A. If you set a single standard, sir, and you set the standard at 8 per cent, it would mean that all those varieties that do not measure up to 50 per cent, it is putting those people out of business. Not only that, but you are saying that they are not edible, and yet as you look over the country, in the Caribbean section these varieties are the livelihood of those people.

Q. I think in his Honor's questions about the fixing of the dates that one more thing needs to be answered: Are these dates fixed for more than one crop year at a time?

A. They are made for one season only.

Q. So that when they are fixed you have behind you the experience of prior years and you take into account the weather, the weather conditions, growing conditions are the same, is that right?

A. That is the flexibility of the marketing agreement, sir.

Q. And the flexibility is that if conditions develop within any season there may be amendments, is that right?

A. Yes.

By Judge Bone:

Q. Counsel, you have been referring to regulations, and I used that expression myself. There are two documents involved here. One here appears on page 19 of this exhibit. That is published in the Federal Register. It was effective [fol. 68] June 11, 1954, and in exhibit A of your Complaint there is a document printed in this exhibit, here, this deposition, appearing on page 35, which is Order 69, Administrative Committee Rules and Regulations.

The word "Committee" bothers me a little.

Now I don't know just what it means. Which of these is or are the regulations with which we are here concerned, and to which I intended to refer this morning?

Mr. Ferguson: At page 19 is the general order establishing the market agreement. That is the marketing agreement. There are no regulations—

Q. Well, when I asked the question whether or not these California avocados met the requirements of the regulations what was I referring to, the document appearing on page 19 or the document on page 25?

Mr. Ferguson: On 24 is a sample of what is called a Maturity regulation. It is a summarized statement of the regulations in effect during that season.

Q. Which of these printed documents—

Mr. Ferguson: That is the regulation.

By Judge Bone:

Q. —is or are the regulations that we are talking about here?

Mr. Ferguson: There are two sets of regulations. "B" on page 24 is a maturity regulation. "C" on page 25 is a quality regulation.

[fol. 69] Judge Bone: Are we to say to ourselves here in disposing of this case that Exhibits A, B and C constitute the regulations we have been discussing here?

Mr. Ferguson: "A" is broader than that. "A" is the entire order of the Secretary and it lays the basis for the

regulations, how they should be made, how they should be obeyed. Then you go on and from season to season you make the regulations. The maturity regulations are made over again year by year. The quality regulations, the grades established, are not changed so often; but the exhibit on page 25, "C", is the first grading regulation.

I will offer at a subsequent time whatever is subsequent, both as to the maturity regulations and as to grade regulations, and we will offer them by way of judicial notice from the Federal Register.

Judge Bone: I had no opportunity to see these.

Judge Goodman: You don't have to offer any of these, just ask for judicial notice.

Mr. Ferguson: Just ask for that, and I will supply copies for judicial notice.

Now for the purpose of including them in cross examination, if need be, by counsel for the Defendants, I would like to make an offer of the exhibits identified as Plaintiff's Exhibits 23, 24, 25 and 26.

Judge Goodwin: We will reserve the ruling on that.

[fol. 70] Mr. Ferguson: If Counsel wishes to cross examine he would know that they are offered.

Judge Goodman: We will reserve the ruling on that. Does that conclude your direct examination?

Mr. Ferguson: Yes.

Cross examination.

By Mr. Fourt:

Q. Doctor, is there a season of maturity on the varieties of avocados grown in Florida?

A. Usually they are classified as Summer varieties—

Q. No, a season of maturity.

A. A time of maturity, do you mean by that?

Q. Yes. Is there a period of time in the growing of each variety of avocados when the avocado, when picked, will then develop into a soft, flavorable avocado?

A. Yes.

Q. A moment ago you mentioned that you had read literature in the field. Have you read the publication,

Avocado Production in Florida, by A. L. Stahl(?) in April, 1942?

A. Yes, I know him very well, sir.

Q. Do you consider him a reliable authority?

A. He did work on avocados many years ago, sir.

Q. Is the Booth 7 variety a popular commercial variety of avocado in Florida?

A. I think it ranks about fourth or fifth.

[fol. 71] Q. Would you agree that the statement of Mr. Stahl that the oil content during the period of maturity for the Booth 7 is from 10 to 14 per cent?

A. In our experience we haven't tested them that high.

Q. Is the Booth 8 a popular commercial variety in Florida?

A. It would rank maybe fourth or fifth.

Q. Would you agree with the statement of Dr. Stahl that the oil content of the Booth 8 variety during the period of maturity is 8 to 12 per cent?

A. I would not agree with that statement, sir.

Q. Is the Lula variety a popular commercial variety of avocado?

A. The Lula avocado is the leading variety.

Q. Would you agree with the statement of Dr. Stahl that during the period of maturity the Lula avocado has an oil content of 12 to 15 per cent?

A. The Lula avocado as we have tested it during the period of maturity and palatability does not run that high.

Judge Goodman:

Q. How high?

A. The Lula avocado, when it is acceptable to be shipped, runs about 6 to 7 per cent, sir. May I just inform the Court—

Judge Goodman: Please, wait for the next question.

Mr. Fourt:

Q. Doctor, you mentioned that there were West Indian varieties in Florida, and you mentioned that their period [fol. 72] of time after picking before they become soft was shorter than for the hybrid variety?

A. Yes.

Q. How do you account for this shortness of period?

A. I can't account for it except the varietal differences. I can point that out in many other types of fruit.

Q. Are the West Indian varieties more difficult to market than the hybrid varieties?

A. What do you mean by more difficult?

Q. Do you understand what I mean by the term "shelf life" in avocados?

A. Yes.

Q. What do you mean by "shelf life"?

A. "Shelf life" is usually referred to as the period in which the fruit is held at the retail level.

Q. Is the shelf life of the West Indian variety shorter than the hybrid variety?

A. It usually is.

Q. And is this of some importance to the retailer?

A. It could be, yes.

Q. In what respect would it be important?

A. It would mean that he would have to move his avocados faster or at least take more precautions and not leave them out on the shelf; put them in the refrigerator.

Q. Do you know a Margaret J. Mustard, a permanent employee assigned to the University of Miami?

[fol. 73] A. Personally, yes.

Q. Are you acquainted with her research paper, The Effect of Cold Storage on Florida Produce?

A. I am familiar with it, sir.

Q. Do you agree with her conclusions—is there a condition called "Internal browning in avocados"?

A. There is, sir.

Q. Would you describe that?

A. I would rather discuss it under a more popular term, "Chilling Injury". Chilling injury is where the avocado or where the banana turns black in the refrigerator. It is a condition in which the fruit is held at too low a temperature and will not soften or ripen properly. The tomato is a very fine example of that. Tomatoes held below 50 degrees won't ripen with acceptable quality.

Q. Are the West Indian varieties of avocados more susceptible to chilling injury than the hybrid varieties?

A. We have done testing on each, but we are not ready to draw a conclusion. I would say that there are varietal differences. I wouldn't limit it to the West Indian race. Perhaps you better bring out the fact that we—

Judge Goodman: Please, please. You do your job, which is to testify, and let the attorney do his job of asking the questions.

By Mr. Fourt:

Q. Would you agree with the statement of Margaret [fol. 74] J. Mustard that, quote "The Waldin variety of avocado is highly susceptible to internal browning"?

A. Again I will say that we are doing that type of work and I would not like to confine it to the Waldin or any one race yet.

Q. Would you agree as to this particular variety, the Waldin?

A. No, I would not agree yet.

Q. Is the variety Trapp a West Indian variety?

A. Yes.

Q. Would you agree with the statement of Margaret J. Mustard that, quote "This variety, like the Waldin, is highly susceptible to internal browning"?

A. Again I would like to answer the question but you are referring to chilling injury, and I would not like to confine it to any one variety or race.

Q. Is it true that Florida avocados when shipped outside the state are usually shipped under refrigeration?

A. Yes, usually.

Q. And would such fruit then be susceptible to the danger of having chilling damage?

A. Not necessarily. It all depends on what temperature you are going to hold them at, sir.

Q. But that adds to the risk of the shipper, does it not, that they would be susceptible?

[fol. 75] A. As it would apply to bananas too, sir.

Q. Yes.

By Judge Bone:

Q. Maybe we ought to clear up one thing: When we speak of refrigeration, do you mean shipped out in reefer cars and frozen, or what do you mean by that question, Counsel?

Mr. Fourt: Yes.

Q. How are avocados shipped out of Florida, by what means?

A. Largely by trucks.

Q. And what type of cooling devices are used in those trucks?

A. There are two types of cooling devices. One is straight ventilation, in which there is no refrigeration used at all. The vents are open, and the ventilation is used, and during the winter season that is the type of refrigeration or type of cooling that is used. During warm weather trucks are equipped with refrigerating units and these are set automatically at a certain temperature and maintained.

By Judge Bone:

Q. Is that dry ice?

A. No, mechanical.

By Mr. Fourt:

Q. Is the danger of damage to Florida avocados through chilling injury increased by the amount of the increase in distance that the avocados are to be shipped?

A. I would say that chilling injury would be more related to the temperature than it would be to length of time. And [fol. 76] you can see the reason for my answer: If you held the temperature at 60 degrees, which would be a refrigerant temperature, then time would not be a factor. If you held them at 40 degrees, why, then, temperature would be the most evident.

Q. Doctor, would you agree with this statement of Dr. Stahl in the Changes in Composition of Florida Avocados in Relation to Maturity, in May, 1933, quote—have you read this document?

A. What year was that?

Q. 1933.

A. 1933?

Q. Yes.

A. Yes, I know the publication.

Q. Quote, "The fat and oil of the avocado, of course, is its chief constituent other than water, and when it has reached its maximum there is no doubt that the fruit is mature."

Would you agree with that statement?

A. There wouldn't be any question there, because when it reaches its maximum, why, that would be even overripe, sir.

Q. Would you agree with this statement, quote "That fat content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit"?

A. I wouldn't agree with that statement, sir.

Q. Would you say, then, that there is a difference of [fol. 77] opinion between yourself and Mr. Stahl?

A. I would say on that point there is a very definite reason for change of opinion.

Q. Turning to the palatability testing of your station, did you have any personal knowledge of the person who picked that fruit? That is, were you there when it was picked?

A. In some instances, yes.

Q. Were you there in 5 per cent of the instances when it was picked?

A. No, I was not, sir.

Q. Do you have any personal knoweldge of the source of the fruit except for those occasions when you were there when it was picked?

A. I have visited every source from which our fruit has been picked.

Q. Were you there when the fruit was picked?

A. I have been there when the fruit was picked, but not on every occasion.

Q. Not more than 5 per cent of the cases?

A. That is right, sir.

Q. Was the name of the variety of fruit identified on the shipment when it arrived at Orlando?

A. Every lot of fruit was identified by this means: That each sample was placed in the bag separately and labeled separately, so each bag of fruit was identified as to variety [fol. 78] and source.

Q. It was identified then from the package or shipment from which it came?

A. No, I am not saying that. I said each lot of fruit. There may be five or six lots of fruit in one package.

Q. Now, with the exception of these few occasions when you were present when the fruit was picked you have no personal knowledge of the date when this fruit was picked?

A. The date when they were picked?

Q. Yes. No personal knowledge of the date when the fruit was picked?

A. I would have to depend entirely upon the correspondence.

Q. Who were the members of your tasting panel to whom you delivered samples of avocados?

A. At our Orlando station?

Q. Yes.

A. I could give you some names.

Q. Would you just describe who they were?

A. Yes, they were members of our station staff: Mr. Winston, Mr. Sunday, Mr. Cubbedge, Miss Dudak, Mrs. Welty, Miss Parker, Mr. Williams, Mr. Meckstroth and Mr. Forrest.

Q. Had they received any training as to their duties and obligations as tasters?

A. We have been testing fruit over a period of 25 years. These are staff members who while not expert yet know [fol. 79] how to evaluate fruit, so I would classify them as fairly good tasters.

Q. Do you know where their homes were? Were their homes in Orlando?

A. As you know, Government people come from all parts of the Country, and while they made their home there, most of them have a background quite different. I could go into any one of their backgrounds if you would like me to.

Q. Yes. Were there any individuals from New England?

A. Yes.

Q. From the deep south?

A. Yes.

Q. From California?

A. At the present time, yes.

Q. No, when these tests were made you discussed before?

A. I am of the opinion that none came from California.

Q. Now was your purpose of these taste tests to ascertain consumer acceptance of the samples submitted to them?

A. That is right, sir.

Q. And is it true then that these persons then were to represent the consuming public in the United States?

A. That was the idea.

Q. And how many persons did you utilize as tasters?

A. In these panels in the earlier work somewhere around ten tasters were used.

[fol. 80] Q. Doctor, are there a number of variables in Florida avocados that would influence the size of the fruit?

A. Yes, I would think there would be.

Q. Would horticultural practice affect the size of the fruit?

A. I would be inclined to suppose so.

Q. And is it possible then that there could be a large adolescent fruit which in fact yet would be immature?

A. Very much so. That is the reason we call attention to varieties, sir.

Q. And is it true that the maturity of fruit of two trees side by side might vary considerably?

A. That is right. They would vary to some extent.

Q. And did you find any consistency that the large fruit would be more palatable than the small fruit?

A. That is right, sir. Of a given variety.

Mr. Fourt: May it please the Court, I have not seen the exhibits here that have been marked for identification, except the first one, but it consisted of apparently statements made in testify, it consists of pamphlets written in the Florida State Horticultural Society, it consists of—usually these are research papers, apparently written by Dr. Harding. We suggest that these papers are inadmissible hearsay; that the witness is here, and that Counsel should ask anything that he wishes Dr. Harding to present at this time rather than in the form of a research paper.

[fol. 81] Judge Goodman: You are renewing your objection, then?

Mr. Fourt: Yes. And of course we also feel that they are irrelevant.

Judge Goodman: Are you finished with your cross examination?

Mr. Fourt: Yes.

Judge Goodman: Any redirect, Counsel?

Redirect examination.

By Mr. Ferguson:

Q. Doctor, you were asked whether there was a season of maturity for Florida avocados. Is there a single season for all varieties of Florida avocados?

A. No, indeed not.

Q. Are there maturity seasons for each variety?

A. That is what characterizes a variety, is the shape of the fruit and the time of ripening.

Q. You were asked about your staff of tasters. You have members on your staff who assist you in the picking of fruit, and the making of oil tests?

A. Would you ask that question again, please?

Q. Do you have—have you had assistants who participated with you in the making of oil tests?

A. Oh, yes. I have a fairly large staff.

Q. Will you tell us who these assistants have been and what are their qualifications?

A. I would be very happy to.

[fol. 82] During the year 1954-'55 Dr. Mortimer J. Soule, who took his A.B. degree, I believe, from the University of Florida, his Master's—no, from Cornell; his Master's degree from the University of Miami in Horticulture; his Doctor of Philosophy degree from Florida State University—that is the University of Florida at Gainesville.

Mr. Nelson has his B.S. degree from Florida.

Dr. Hatton, who is presently at the Miami station, took his degree at the University of Washington, his Doctor's degree.

Judge Halbert: Wait a minute, maybe I am lost here. What is the relation of these people to the testimony here?

A. These are staff members who assisted me in making these tests.

Judge Halbert: What kind of tests? What kind of tests are we talking about?

Mr. Ferguson: The question was asked on cross examination.

Judge Halbert: I know, but what kind of tests are we talking about?

Mr. Ferguson: I said oil tests, maturity tests, which includes—

By Judge Halbert:

Q. Maturity tests?

A. Yes.

Q. What kind of maturity tests?

[fol. 83] Mr. Ferguson: All kinds, including oil tests.

Judge Halbert: I am not quite sure that I understand how the testimony of this witness is bolstered up by saying that there are other people who are skilled in this line who work with him. Don't we have to depend upon what he tells us here, what he knows of his own knowledge about it?

Mr. Ferguson: I take it that Counsel has asked these questions because there is offered here lists and summaries of tests. He asked him about the fruit that was picked, and who picked it, and how it was picked, and I am asking him the same thing, to identify the persons who helped to do it and their qualifications, and I think we are on the way to an answer.

(Discussion between Court and Counsel.)

Judge Goodman: Is there any difficulty in examining the quantity of oil in an avocado?

Mr. Ferguson: Any difficulty?

Judge Goodman: I mean that wouldn't require any great skill, would it?

Mr. Ferguson: We want to show that the persons who actually did it had training and the qualifications.

Judge Goodman: Well, let's assume that they had. What is the materiality of that?

Have you got any other examination?

Judge Halbert: I take it Dr. Harding assumes the [fol. 84] responsibility for what he is saying here, that he is not relying on what somebody has told him. If he is it is clearly inadmissible.

A. I take the responsibility for that, sir.

Judge Halbert: In other words, what he is telling us here is what he believes to be the correct situation, and he is not relying upon other people's word in that regard?

Judge Bone: There is a certain percentage of oil in an avocado—this is coupled with a question—would it affect the matter of taste, the way it tasted to the average user, and to what degree does it affect the taste of the avocado? More oil better taste, less oil less desirable taste?

A. That is a rather difficult thing to say, because people who are accustomed to higher oil may prefer higher oil. People who are accustomed to low oil may prefer that.

Q. I am thinking of the reasonableness of this regulation in California here. What are we going to base this doctrine of reasonableness on. That is going to creep into this so far as I am concerned, regardless. Regulation about the amount of oil, what does that have to do with the taste? I know what bananas taste like. Now maybe because they matured and ripened they looked good to me as a kid, and they still do. But how does the oil affect the taste?

A. That is what we are trying to bring out, sir, that you have these different races that have different characteristics [fol. 85] and it is most difficult to show in an oil—

Q. Well, a lot of people might like one flavor and some another. Is there a change in the flavor of the avocado basically, is the flavor changed in any way in the presence of 8 per cent or 6 per cent of oil?

A. In our tests it is not related, sir. We compare one variety with another.

Q. Well, you testified to that earlier in your statement, that this was not related directly, but since this issue is written around us of 8 per cent oil test I want to know what is unreasonable in 6 per cent and reasonable in 8 per cent.

Judge Goodman: Or the other way.

Judge Bone: Or the other way. For three men who are not experts in this field who have to decide a question like that, I would like information.

A. I think you would find if you grew avocados and you had this wide range of avocados, that you would not want it on an oil basis at all.

Q. Well, of course, I don't like the flavor of an avocado anyway, I couldn't be hired to eat one, and I am not an expert. My wife likes them, and I didn't.

Now, does the taste, the desirability of an avocado depend on the percentage of oil in it? Does that provide a flavor that makes the avocado desirable to the user?

[fol. 86] Maybe that is a crude question, but it is interesting to me. Because here your opponent is going to support this regulation of California on the grounds of reasonableness, it doesn't do violence to fair standards, it is not an outrageous thing. Therefore it must be reasonable. If it is utterly unreasonable then it transgresses the rules of fair play, which is constitutional in nature.

A. There would be a fairly easy way to answer if we did not have such an array of varieties that have so many different characteristics to them. So that if you place it on a given oil content you are absolutely condemning those that do not make this. The varieties never will make this.

Judge Goodman: Well, I think what Judge Bone is trying to find out from you is irrespective of variety whether or not the standard of the quantity of oil in the avocado is a reasonable standard—there may be others too—as to the maturity and flavor and acceptability of the avocado. Can you answer that?

A. I wish I could answer it, but—

Q. Well, it has something to do with it, hasn't it?

A. Apparently you do have two parallel things. As fruits ripen they get better, within any range of oil. On the other hand, as fruits usually stay on the tree they also increase in the oil content. Slightly some, other varieties more rapidly. Whether it is the relation of oil, or whether it is [fol. 87] the relation of maturity, you see, is the real problem.

Q. These regulations that you refer to and that counsel has referred to are all regulations of the Department of Agriculture that pertains only to Florida, is that right?

A. It does regulate—it did regulate the avocados coming in from Cuba.

Q. Well, the regulations in those are specifically restricted to avocados in Florida, both the Exhibit A and the Exhibit C.

Mr. Ferguson: May I answer your Honor?—

Judge Goodman: The grade standard as amended is the Florida Avocado Order as amended. So those Federal regulations you refer to are regulations that pertain only to Florida, isn't that right?

A. I know—

Mr. Ferguson: Your Honor, may I add—

Judge Goodman: Well, maybe you can answer it.

Mr. Ferguson: May I add to that by a different regulation the Secretary made the Florida standards applicable to Cuban avocados.

Judge Goodman: But in the United States these regulations apply only to Florida?

Mr. Ferguson: Oh, yes, these regulations that are in evidence in this case apply only to Florida.

Judge Goodman: Now one other question that I would like to ask you, and I hope counsel will pardon us for asking [fol. 88] these questions, because we regard this as the nub of the case, we have to know something about these avocados in order to give some intelligent decision as to the question involved here.

The quantity of the oil in the avocado may be, in the language of the street, an element that might be regarded as the richness of the avocado, is that right?

A. Yes, it might, although varieties that are low in oil content often have this buttery flavor that we are referring to.

Q. As a matter of flavor, but I mean as a matter of content?

A. Yes.

Q. Because as the doctors will tell you, particularly those who specialize in cholesterol today—

A. That is right.

Judge Goodman: —that the quantity of oil makes for the richness of the fat, isn't that right?

A. Yes.

Judge Goodman: Thank you. That is all I have.

By Judge Halbert:

Q. Dr. Harding, how many varieties of avocados are grown commercially in Florida?

A. Well, we regulate some 44, I think it is.

Q. Then there are 44 varieties?

A. Yes.

Q. Of those 44 varieties how many of those varieties under no circumstances would ever reach as much as 8 per cent in oil content? It need not be precise, just approximately?

[fol. 89] A. I would say that are grown commercially, maybe five or six varieties, maybe more.

Q. So that there are 38 or 39 varieties that do—

A. Oh, no—that attained some time during its sphere?

Q. Yes, when they mature.

A. Oh, when they mature?

Q. Yes.

A. Oh, well, that would affect a great many more. It would affect a very large cross section.

Q. Of the Florida avocados that when they mature would have 8 per cent or more?

A. Would have below 8 per cent when they matured.

Q. I don't think I asked it that way. I think I asked it the other way. How many of these reach 8 per cent or more?

A. Then I would answer the question that it would be limited to maybe half a dozen.

Q. Six varieties?

A. Yes.

Q. Can you tell me what varieties you are referring to now?

A. I am referring to later in the season the Lula would average it, the Booth 8 would, in very late season perhaps, the Booth 7 would. Those would be the leading ones, leading varieties.

Q. Well, that is only three, and you said there are about six varieties?

A. Yes, but there are some varieties that are very minor, [fol. 90] like Linda and the—

Q. Well, let me ask it in another fashion, then: What percentage of the avocados that are grown commercially in Florida and shipped commercially outside of the State, what percentage of those would fail to reach 8 per cent or more in oil content if they were allowed to mature in that state?

A. This is purely an opinion, of course—

Q. Well, of course, you are an expert, and that is what we are asking for, is your opinion?

A. I would say 40 per cent of the crop.

Q. I understood you to say earlier that the Lula was the—

A. The leading variety.

Q. —the leading variety.

A. Yes.

Q. What percentage of the avocado crop in Florida is the Lula?

A. I think about 27 per cent.

Q. And the Booth 8?

A. I can give you that (referring to documents).—

Mr. Ferguson: While the witness is looking, may I suggest that your Honor add another factor to the question, time? Time when they reach or pass 8 per cent.

Judge Halbert: Well, I don't want to add that. I want to talk about this oil content alone. You said 27 per cent of the avocados were Lulas?

[fol. 91] A. Yes.

Q. How about Booth 8?

A. About 18 per cent Booth 8.

Q. All right, Booth 7?

A. 10½, 10.25.

Q. Lindas?

A. Let me put Waldins next, because that is the next we have.

Q. All right, Waldins.

A. 9 per cent. Booth 1, 5 per cent.

Q. All right.

A. And then all the rest are below 3 per cent of production.

Q. Then Linda is not one of the principal ones.

A. Oh, no.

Q. Well, you gave it to me a moment ago?

A. I gave it because of the high oil content.

Q. Now, are all these six that you have given me here now, or five that you have given me here now, are they all avocados that would reach 8 per cent oil content?

A. During some time of its life if it were left on the tree, most of the Lula avocados would meet 8 per cent. A part of the Booth 8.

Q. Well, I make that 69 per cent of your production of avocados?

A. But, here is the point, sir: Lula avocados may be picked long before they reach 8 per cent. At some time in [fol. 92] its life it is going to reach 8 per cent.

Q. Well, Dr. Harding, the only question before us here as I see it—maybe my brothers won't agree with me—is whether or not this regulation in California is an arbitrary one, and if I understood your testimony correctly the California regulation could be met by 61 per cent of the avocados in Florida.

A. I don't think that is the way I meant it. You asked the question will they meet it some time. They may meet it, but maybe that would be the last 20 per cent of the shipment of that particular variety.

Q. Isn't that the whole story that brought on all these agricultural regulations. My folks, when they were alive, had oranges starting back in the 1890's. People kept getting more and more hoggish and they kept picking their oranges earlier and earlier. In the area where I grew Washington Navels became ripe in the Fall. They are not fit to eat until about January or February for anyone who lived where they were grown. But they kept moving them back until they were picking oranges in September and

sending them back east, and then they wondered why they got red ink on them. The point is that if they leave the fruit on to the proper date it does affect the fruit, it just simply affects the time when they get their money for it, isn't that it?

A. There is a lot of reason to that. On the other hand, [fol. 93] these West Indians and Waldins play a big part there, and the Booth 8. They are acceptable and desirable even before that time. They are mature. Now they may not have reached prime condition, but they are mature. They are acceptable. They are pleasing to the taste.

Q. Well, the West Indians we are not discussing in this 69 per cent, are we?

A. Yes, I listed Waldins.

Q. Is Waldin a West Indian?

A. Yes.

Q. I thought that was a hybrid.

A. No, that is West Indian.

Q. Well, we are talking about 9 per cent then, with Waldins. What else of this list here is West Indian?

A. Lula, Booth 8, Booth 7. Those are all hybrids.

Q. I assumed they were, with those names.

A. Yes.

Judge Goodman: All right, Mr. Ferguson, anything else?

By Mr. Ferguson:

Q. I would like to put the same question, Dr. Harding, in relation to the time of picking under the maturity regulations, whether or not these avocados have reached 8 per cent by that time, or whether if you say that they may ultimately reach 8 per cent, what is that time in relation to the marketability of the fruit?

A. Well, in the case of Waldin you would probably have [fol. 94] all your crop drop. In the case of the Booth 8 you probably would shorten the season far beyond what it should be shortened, and with some of the other varieties the same way. They would be overripe, they wouldn't have the carrying qualities.

Q. Does that mean then that just by leaving an avocado

on the tree a longer time it might have more oil but would either drop or be unmarketable?

A. It would mean that in the case of some of these the crop would be on the ground. In the case of others they may be overripe and not have carrying quality. In other words, you couldn't ship them any length of time or any distance. So in reality it would affect it the same way. It would mean that they would be practically unmarketable.

Q. And you say it is your opinion that the question has to be answered in relation to the proper time for picking and marketing?

A. Yes.

Q. Could you state a percentage that in your opinion would survive long enough for marketing with 8 per cent or more? I didn't quite get it when you answered his Honor on that question.

A. Very likely I avoided that question, because I don't know.

Mr. Ferguson: I may say that there is a great deal of data already in the record bearing on that.

[fol. 95] Judge Goodman: Can Counsel agree whether or not the United States Department of Agriculture, the Marketing Service, has issued any grade standards for California avocados?

Mr. Fourt: There are grade standards for avocados which are available for any State that wants to use them. The State of California has never adopted those grades.

Judge Goodman: Florida is the only state in the United States for which the Agricultural Marketing Service has provided grade standards for avocados?

Mr. Fourt: That is correct.

Judge Bone: Nothing of that kind has ever occurred in California?

Mr. Fourt: The State has enacted its own grade standards, sir.

Judge Bone: Well, would that preclude the Department of Agriculture Marketing Service coming in and establishing grade standards?

Mr. Fourt: No, no, it would not. Definitely not.

Judge Bone: You see how it gets into this picture, Coun-

sel: Your opponent has cited this regulation that we are talking about here applies only to Florida. It has an Interstate Commerce connotation. There is no Federal action here in California?

Mr. Fourt: That is correct.

Judge Bone: It is a unilateral action by the State of [fol. 96] California?

Mr. Fourt: That is correct.

Judge Halbert: May I ask you, if you can answer this, is it not a fact that the State has to ask that these regulations be put into effect? It is not something that the Federal Government acts upon or imposes upon, it is something that the growers ask, is it not?

Mr. Fourt: Yes, the growers and handlers petition the Secretary of Agriculture and they have a referendum in the industry as to whether they want the Federal regulations imposed on them.

Judge Halbert: Florida has asked this, California has not.

Mr. Fourt: That is correct. I have another question.

Judge Goodman: Have you finished with your redirect?

Mr. Ferguson: Go ahead.

Recross examination.

By Mr. Fourt:

Q. Doctor, you are acquainted with Dr. R. L. Harkness?

A. Yes.

Q. Who is he?

A. Dr. Harkness is Associate Horticulturist at the Agricultural Station at Homestead.

Q. Have you read the papers published by him?

A. I have.

[fol. 97] Q. In your testimony and opinions do you rely in part on his papers and research?

A. We have had a cooperative project, as you know, and you are probably referring to papers in connection with our work. Yes.

Q. So it is a cooperative project between yourself and Dr. Harkness?

A. It is a cooperative project with the Florida State Experiment Station.

Q. Is he a member of that station?

A. He is a member of the station.

Mr. Fourt: No further questions.

Mr. Ferguson: That is all.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Bone: Is there anything, Mr. Fourt in the record, the public record here, which indicates what motivated California, the Legislature, I assume, in adopting this rule? Is it grounded on public health, public morality, public welfare, or what is the purpose of it? It may be you will cover it in your testimony. If you are I will abandon the question.

Mr. Ferguson: There is nothing in the record, if that is the question.

Mr. Fourt: The available scientific publications indicate that there was a severe problem prior to 1925 of infested fruit and the marketing of fruit that fell on the ground. [fol. 98] (Discussion between Court and Counsel.)

Judge Goodman: Well, let's get back to our record here. Do you have something else to offer for the Plaintiffs in the case.

Mr. Ferguson: Just by reference to the Federal Register. This is it, your Honor: There is now in evidence, in one way or another the maturity and quality regulations under this Marketing Order for four seasons, 1954-'55, 1955-'56, 1956-'57, 1957-'58. That is where we ended our testimony before.

Now, I wish to add by reference to the Federal Register the maturity regulations in two other completed seasons, 1958-'59, 1959-'60, and perhaps it will be sufficient for me to give the citation to the Register and I will give Counsel copies, mimeographed copies of these regulations.

For 1958-'59, it is Order No. 16, an original order and eight amendments, Federal Register 23, pages 3104, 4349, 5476, 6318, 7343, 7943, 8047, 9055, and 9689, and one in Volume 24 at page 1152.

And then the maturity regulations for the 1959-'60 season, Order No. 18, the original order and six amendments, all in Federal Register 34 at these pages: 4050, 4827, 5824, 6904, 7354, 8843, and 9262.

Judge Bone: What materiality have those orders in the Federal Register? What bearing do they have on what we [fol. 99] have to wrestle with here?

Mr. Ferguson: The crucial matter in this case, your Honor, from a commercial standpoint, is the time when these avocados are ready to be marketed, which is fixed by these orders. Our evidence shows that at that time there are very few of them that could possibly meet this California test, so that the result is to impose an embargo on most all of the Florida avocados. It is only late in the season when most of the Florida avocados have been marketed elsewhere and the California embargo has been in effect all the time, it is only late in the season that some of them come here at risk. Some pass and some do not pass. But the point is that these are very important.

Judge Bone: Are these regulations you are now referring to?

Mr. Ferguson: Oh, yes, your Honor.

Judge Bone: You think they have direct bearing on the issues here?

Mr. Ferguson: Yes, your Honor.

Judge Bone: You read off a whole list of them, and I couldn't have written them down if my life depended on it.

(Further discussion between Court and counsel.)

Judge Goodman: Is there anything that you want to add?

Mr. Ferguson: Yes, I was going to add the supplemental quality regulations, which are Order No. 17 in 24 Federal [fol. 100] Register at 3105 and 9123.

Also in the Federal Register—and these I have no copies to furnish; I have written to Washington and asked for someone from the printing office to send them, and undoubtedly will get them in due course, but I think they should be in the record—the notice of hearing on this plan and the decision of the Secretary and his findings, which are quoted in the pleadings, and in Counsel's trial memorandum, and I would like to know that they are taken by judicial notice.

Judge Goodman: So the record will be clear and to obviate a lengthy discussion on it, the Court will take judicial notice of all references in the pleadings or here in Court to the Federal Register or Federal Regulations at any time.

Mr. Ferguson: Well, I will just state the volume numbers and that is all that is necessary.

Judge Goodman: All right.

Judge Bone: Your position is that they cover the entire United States in effect?

Mr. Ferguson: Oh, yes,—

Judge Bone: Of course, I realize that Florida and California are the two avocado producers in this country, but what you are saying to us is that they affect the whole United States wherever avocados are grown.

Mr. Ferguson: For the purpose of Interstate Commerce, 90 to 95 per cent of the Florida avocados are sold and must [fol. 101] be sold in Interstate commerce.

(Further discussion between Court and counsel.)

Mr. Ferguson: I would like to just give these references, and what bearing they have your Honors will decide in due course.

Volume 19, No. 33, page 909. 19 Federal Register, 2418: 19 Federal Register, 2784.

With that the Plaintiffs will rest.

There is in suspense the status of the record as to the evidence, and also our motion for substitution.

Now frankly I assumed there would be no question whatever about the substitution in view of the prior ruling of his Honor, Judge Halbert; but as there was a sentence omitted from the motion, something I learned of on Friday, I take it I will have an opportunity to add that sentence to my motion, and the motion for this purpose is and has been accepted as pleading, and declarations under Rule 25 can be made in a motion as well as what is called a pleading. If this motion is elliptical and too short, the reason is that the Court having already ruled on exactly the same situation, I didn't suppose there would be any argument about it.

Judge Goodman: Now does that conclude your case?

Mr. Ferguson: Yes.

Judge Goodman: Now, how much time do you want or do you intend to take, or do you think the Court will permit [fol. 102] you to take in presenting what you have to present?

Mr. Fourt: If the Court please, our witnesses, I feel, will take the best part of tomorrow, unless the Court grants the motion we would like to make now at this time, that the Plaintiff's case can be dismissed.

Judge Goodman: All right, make it.

DEFENDANTS' MOTION TO DISMISS

Mr. Fourt: We have no evidence before the Court of any shipments being made to California, no evidence of any interference in California, of any of the Plaintiff's avocados. There is no showing of irreparable and grievous injury required for a three-Judge Court. We feel that at most the Plaintiff's case here has been one for declaratory judgment.

In the absence of a showing of irreparable injury the Court should not reach the Constitutional issues. Our memorandum cites the Steelman case.

(Argument.)

Judge Goodman: Let the record then show that we will take your motion for dismissal after the Plaintiff's case is completed under advisement.

Mr. Fourt: There is a further question, your Honor. We have the problem of Dr. Harding. I would assume that Dr. Harding may want to leave and be beyond the call of [fol. 103] the Court. We take it that the exhibits marked for identification have not been offered in evidence.

Mr. Ferguson: They have been offered in evidence.

Judge Goodman: They have been offered in evidence but we have reserved the ruling on them.

Mr. Fourt: All right, then if the Court please we would like to have Dr. Harding remain within process of the Court in order that we may call him as our own witness in the event those exhibits are admitted in evidence.

Judge Goodman: Will you be here tomorrow, Dr. Harding?

Dr. Harding: Yes.

Judge Goodman: Then we will have no problem. We will take a brief recess.

(Recess.)

Mr. Fourt: If the Court please, we would like to call Mr. Poulsen.

H. W. POULSEN, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?
The Witness: H. W. Poulsen.

By Mr. Fourt:

Direct examination.

Q. Your name, sir?
A. H. W. Poulsen.
Q. Your address?
[fol. 104] A. 1220 N Street, Sacramento, is my business address.
Q. And your present position or employment?
A. I am Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture.
Q. And is there a Bureau charged with supervision of County, Commissioners of Agriculture under your supervision?
A. There is.
Q. And what is that Bureau called?
A. That is called a Bureau of Fruit and Vegetable Standardization.
Q. When was your first employment with the State of California?
A. In the month of July, 1923.
Q. And what position was that?
A. Shipping Point Inspector.
Q. Have you remained continuously in employment with the State of California since that time?
A. A break of possibly 10 days early in August and back immediately following, and since then continuous service.

Q. Would you briefly describe the successive offices you have held in the State of California?

A. From the shipping Point Inspection work, which I started in 1923, within less than a year I went into the portion of the Department called the Fruit and Vegetable [fol. 105] Standardization enforcement work at that time. This particular work pertained then to enforcement of the fruit and vegetable standards of the Agricultural Code through the County Agricultural Commissioners in various areas of the State.

Following that in about 1929 I became Assistant Chief of the Bureau, and in 1924 Chief of the Bureau, then called the Bureau of Fruit and Vegetable Standardization, and remained in that position until May of last year, at which time I was appointed to the position I now occupy.

Q. Were all these positions civil service?

A. They were.

Q. And were written examinations required for these positions?

A. In all but the first position I qualified in written examinations were required.

Q. Does this employment have any relation to the State law pertaining to avocados?

A. It does.

Q. And would you explain that relationship?

A. Yes. The fruit and vegetable standards of the Agricultural Code contains a section relating to avocados, in which one of the requirements is that the fruit must have attained 8 per cent of oil content. The standards in which this provision is located are enforced by the Department of Agriculture through the County Agricultural Commissioners of the State, and they, the County Officials, [fol. 106] under the direction and supervision of the Department of Agriculture.

The representatives of the Fruit and Vegetable Standardization Department are designated by the Director, and have been over these many years as his representative in the enforcement of these laws throughout the State.

Q. With reference to the statute pertaining to avocados, would you describe the conditions of your own knowledge which led to the enactment of this law?

A. The laws relating to avocados, like many of the other laws, providing standards of quality and maturity, were deemed to be necessary by representatives in the industry due to deplorable marketing conditions. Specifically with reference to avocados, the fruit being produced in the State at that time—the volume, of course, being considerably less than now,—was being marketed by individual growers through their marketing channels without any guidance or directive as to its quality or its oil content, the result being that fruits which were very definitely unpalatable were being placed upon the market, thereby damaging the reputation of the industry by providing consumers with undesirable avocado fruits.

Q. Are avocados ordinarily picked in a hard or soft condition?

A. In a hard condition.

[fol. 107] Q. And are avocados usually purchased by the wholesaler in a soft or hard condition?

A. They are.

Q. No—

A. They are purchased in a hard condition.

Q. And why is this so?

A. Because the fruit itself cannot carry to the ultimate consumer in the softened condition. When it is in the softened condition it is ready to eat at that time.

Q. Can the ripeness or maturity of an avocado be determined from its appearance when it is in a hard condition?

A. Only by a very expert person.

Q. Would a retail grocer qualify in the ordinary case?

A. No, they would not.

Q. How about a person in the wholesale trade?

A. Only if a person representing a particular wholesaler was assigned for a number of years, usually several, to the avocado problem alone could he be able to determine it. It is not easy.

Q. What occurs to the avocado if it is picked in an immature and unripe condition?

A. Very often it shrivels, the flesh becomes rubbery, and is not satisfactory for human consumption.

Q. What relation does the 8 per cent oil content standard have to this problem?

[fol. 108] A. The 8 per cent oil content requirement indicates the edibility, the desirability or palatability, and increases as the fruit continues to grow, and so in my opinion and based on my knowledge it has a direct relation to—the oil content has a direct relation to the maturity.

Q. In your experience how has the standard affected avocados originating in the State of Florida?

Mr. Ferguson: I object to that, if the Court please. There is no foundation for such a question of this witness.

Judge Goodman: It does call for his conclusion as to how it has affected.

Mr. Fourt: Yes, all right.

Q. In your opinion then what—in your opinion is our 8 per cent oil standard valid or has achieved the objective as applied to fruits of avocados originating in Florida?

Mr. Ferguson: I obj ct to that question. That is the ultimate question for the Court to decide.

Judge Goodman: Yes.

Mr. Fourt: Very well. I will withdraw the question.

Judge Goodman: Would you bring out from this witness as to when the requirement of 8 per cent comes into being, at what stage of the fruit's growth?

Mr. Fourth: Yes.

Q. At what stage in the growth and marketing of the avocado does our 8 per cent oil standard apply, when is [fol. 109] the effective time that it applies?

A. It applies as to all avocados which are packed, shipped, offered for sale or sold, and at the time the fruit is taken from the tree.

Q. Where are the inspections of avocados usually made by the County Agricultural Inspectors?

A. As to fruit which is produced and packed in California, the majority of the tests are taken in the production areas in the packing houses in those areas, at the time or immediately after the time that the fruit has been prepared and ready for distribution and sale.

By Judge Bone:

Q. When did this law become effective?

A. In 1925.

Q. 1925.

A. The tests with respect to avocados offered for sale in wholesale markets are taken—the samples are taken, I beg your pardon, generally in the places where the fruit is delivered by the producer or packer to the wholesaler. In other words, at the wholesaler's place of business. In some tests samples are taken at the retail level.

By Mr. Fourt:

Q. With respect to avocados which are brought into the State from the State of Florida where would the inspection usually occur?

A. Most of the tests are made of Florida avocados on samples taken from the truck loads or railroad car loads of fruit as they arrive at their destination, and in many [fol. 110] instances after having been unloaded from the truck or conveyance into a particular warehouse for distribution.

Q. Is there any difference in technique of testing as applied to avocados originating outside the State as to avocados growing within the State?

A. There is not.

Q. Would you describe the mechanics of making the test?

A. Yes, I think I can describe the mechanics of it.

Mr. Ferguson: If the Court please, there is no challenge to the testing. We are not claiming that the testing is not correct.

Judge Goodman: There is no claim that the test is not accurate?

Mr. Ferguson: It is not in issue in this case.

Judge Goodman: I suppose it is only informative, then. Counsel, since it is not in issue.

Mr. Ferguson: It is a highly technical matter. I don't understand it.

Judge Goodman: I beg your pardon?

Mr. Ferguson: It is a highly technical matter, involves

chemistry and a long process. It will take several pages in the record.

Judge Goodman: Do you think you want to take the time on it?

Mr. Fourt: I will withdraw the question, your Honor.

[fol. 111] Mr. Ferguson: It is in the record.

Mr. Fourt:

Q. In your opinion has the 8 per cent oil standard been effective in keeping immature fruit off of the market?

Mr. Ferguson: I am going to object to that question. That is a broad question covering—how many years, 35 years? And to what does it relate? Has it kept immature fruit off the market?

Judge Goodman: I think the question only is has the 8 per cent requirement kept immature fruit off the market, in the opinion of this witness. I think he is qualified to answer that.

Mr. Ferguson: It seems to me the question is too vague and general.

Judge Goodman: Well, it is pretty general.

Mr. Ferguson: It is not about the fruit itself, it is about his job. He is telling the Court he has done a good job, or something of that sort. But what of the fruit which did pass the 8 per cent. The Court is not informed.

Judge Goodman: Well, I suppose the objection again as in the case of the objection made by your opponent goes more to the weight of the testimony than to its admissibility. Overruled.

A. Answer?

Mr. Fourt: Yes, you may answer.

[fol. 112] A. My answer to that is that in my opinion it has done a great deal to keep immature fruit off the market.

Mr. Fourt:

Q. Are there varieties of California avocados which have difficulty meeting the 8 per cent oil standard?

A. There are.
Q. Would you name those varieties?
A. I cannot.

Judge Bone:

Q. What is done with these avocados if they don't meet market requirements? Are they destroyed or are they sold in the course of business?
A. There are by-product uses for avocados, for face creams and other products, which I do not know too much about. But basically the answer is yes. The by-product demand is not too great.

Judge Halbert: I assume, Mr. Poulsen, they can be shipped out, can they, or is this law applicable regardless of whether they are sold in or out of the State.

A. It is applicable regardless of the circumstances, Judge. The law provides that all avocados sold within the state or that are transported within the state or shipped out of the state must meet this requirement.

Judge Bone:

Q. Don't they have to be edible, lawfully edible? In other words, they can be sold, but I am talking about food?
[fol. 113] A. Yes, they cannot be sold without meeting this requirement for food use. They are exempt when used for by-products or for livestock feeding purposes.

Judge Halbert:

Q. And that applies whether it is California or Nevada or Oregon, they have got to meet—if they are California avocados they have got to meet this requirement?
A. That is right.

Mr. Fourt:

Q. Is a handler or other person in possession given an opportunity to recondition a lot if an inspector finds immature avocados in it?
A. Yes, he is.

Q. Will you describe how that reconditioning is usually done, in practice?

A. It is normally done by any difference which the person who has in his possession can use, such as evidences of immaturity, if he is expert enough, by size, or any other means which can be determined.

Q. In your experience is there likely to be less or more oil content in a smaller size as opposed to a larger sized avocado?

A. This varies, but in my experience and based on the theory that the larger fruits on a given tree are older in their development, the larger ones will have more oil in them.

Q. Do most complete truck loads or trailer loads of [fol. 114] avocados have more than one size of avocado in a lot?

A. They do.

Q. And is each size of avocado packed in its own container or are the sizes mixed.

A. Normally they are sized, and each size is packed in its own container.

Q. In most lots which are rejected will the immature fruit be found in the smaller sizes or larger sizes?

A. In my experience, in most lots the immature fruit would be found in the smaller sizes.

Q. Is the handler or person in possession of a lot of avocados brought into the State from, say, the State of Florida, given the opportunity to reship those avocados outside the state?

A. He is.

Judge Goodman: And what is the procedure for giving that permission?

A. The lot in question is rejected on a normal form used for that purpose, indicating that these cannot be offered for sale or sold in the State of California. If the person in possession of the lot requests that the load be taken to a market in another State it is granted and the form designated as a disposal order directing them that this lot be taken outside of the State based upon the request of the person in possession is issued, and this becomes evi-

[fol. 115] dence of the excepted or authorized disposition to the Border Inspectors at the border of the State of California.

Q. Would such a person also be given an opportunity to recondition the lot if he so desires?

A. He would.

Mr. Fourt: No further questions.

Cross examination.

By Mr. Ferguson:

Q. Mr. Poulsen, what is the predominantly racial character of California avocados?

A. Racial character, what do you mean? West Indies, Guatemala, Mexican?

Q. By origin, yes, derivation, the original roof stock.

Mr. Fourt: If the Court please, the question is beyond the scope of the direct examination.

Mr. Ferguson: Well, that is what you were talking about. California avocados and their oil content. You wanted to make them applicable to Florida avocados, so the Court has to know whether it is the same animal.

Mr. Fourt: Well, we asked no questions regarding varieties of California avocados. We will submit the objection, your Honor.

Judge Goodman: The witness is not really qualified. We will overrule the objection. If he can, he can answer.

A. What is that?

[fol. 116] Judge Goodman: Answer that if you can.

A. Oh. I am not able to answer it, doing justice to the question.

Mr. Ferguson:

Q. What is the leading California avocado in volume of production and sale?

A. I think that Fuerty is the leading one in volume of sale.

Q. And what oil content does the Fuerty run?

A. What oil content does the Fuerty what?

Q. What oil content does it attain?

A. Well, it is required by law to meet a per cent of oil content, if that answers your question.

Q. Now, that does not answer my question. Are you familiar with the fruit?

A. Somewhat.

Q. And its characteristics, especially as to oil content?

A. As to oil content I have some information concerning it.

Q. Well, that is what I am asking you about.

A. How high they will go, you mean?

Q. Yes.

A. I have known Fuerty avocados that will test 15 to 20 per cent of oil content, maybe a little better.

Q. Do you know some that go as high as 30 per cent?

A. Possibly.

Q. And they are still marketable with that oil content, is [fol. 117] that right?

A. I cannot testify to that.

Q. Do you know, as a matter of fact whether any volume of Fuerty avocados are sold in the State of California when they attain 8 per cent oil content, just at that time?

A. Is your question whether or not they are over 8 per cent when they are sold?

Q. That is part of the question.

A. Yes, I think that a large portion of Fuertys sold in California exceed 8 per cent.

Q. You said something about palatability. Would a Fuerty avocado with 8 per cent oil content be palatable?

A. Reasonably so.

Q. Well, what do you mean by reasonably so?

A. Well, it is better if it has a higher oil content.

Q. Well now, you know something about the operation of the big cooperative in this State, Calavo?

A. Some.

Q. Do you know whether they sell any varieties at 8 per cent oil content?

A. I have never made it a point to determine that. I don't know.

Q. Do you know anything about the writings of Mr. J. Elliot Coit?

A. I know of J. Elliot Coit, and have seen some of his [fol. 118] writings, but I am not familiar with it.

Q. Do you know his standing in the industry?

A. Yes; I understand he was a research worker.

Q. Did you read his article in the 1957 yearbook of the California Avocado Society about avocados?

A. No, I do not think I have read that.

Q. How many varieties of avocados are there in California?

A. I cannot answer that.

Q. There is a list of about 350, isn't there, but not all commercially important.

A. I would have to inquire as to that.

Q. Well, you have named the Fuerty. What is another California avocado of high volume production and sale? If I mentioned the Haas, would that be next?

A. I don't know that it is next. I am not familiar with the figures in production relating to the volume in connection with the total.

Q. Do you know anything about the oil content of the Haas?

A. Not specifically.

Q. Do you know whether the Fuerty was grown in Mexico—I was thinking of its place of origin—grown in Florida?

A. I do not, no.

Q. Are the Haas?

A. No, I don't know that either.

Q. Or any other prominent California variety?

[fol. 119] A. I do not know.

Q. Well, let me ask you the reverse. Is the Lula grown in California?

A. Not to my knowledge.

Q. Is the Booth 8 grown in California?

A. Again not to my knowledge.

Q. Is the Waldin grown in California?

A. I don't know of it.

Q. Any of the other Booths, 7, 3, 1?

A. Again not to my knowledge, commercially.

Q. Mr. Poulsen, you know enough about avocados to know that there are decided differences in the characteristics of these different varieties, do you not?

A. Yes, I do.

Q. And one of those differences has to do with oil content, is that right?

A. Is that a question?

Q. Yes, that is a question.

A. You are asking me if I know that one of the characteristic differences in varieties is the percentage of oil?

Q. Yes.

A. At what time in its development?

Q. At the time of the marketability from maturity, permissive marketing.

A. Legally 8 per cent is the minimum with reference to [fol. 120] all of them, Mr. Ferguson, in California.

Q. Well, let me put it a little differently: Not all varieties reach 8 per cent at the same time, do they?

A. No. Different varieties have different maturity dates.

Q. When you are talking about maturity dates you are talking about 8 per cent oil content, is that right?

A. Generally speaking, yes, the legal—

Q. Well now, wait a minute. Generally speaking. Is there any other maturity test in the State of California other than the 8 per cent oil content?

A. No legal test or requirement besides the 8 per cent that I know of.

Q. Where would you get it if it was not a legal requirement?

A. You indicated the—

Q. Just a minute. Is there some other source from which you get determination other than a legal requirement? Do you mean it is a trade practice?

A. There is no other than legal one from the standpoint of the law.

Q. I think that answers the question. Now have you with you Bureau circular 101? Have you a copy of that? Your department has set forth instructions about testing, isn't that true?

A. Yes, in the Administrative Code.

[fol. 121] Q. In the Administrative Code. And there was first Bureau Circular 101. Do you remember that?

A. I do not remember specifically. I would have to look at it.

Q. Well, see if I can remind you of it by reading the language, and this is the instructions to the Inspector, that the least mature fruit must be selected from containers which contain the least mature fruit, and that the smaller sized fruit is normally more immature than large sized fruit. Test the smallest fruit first.

Mr. Fourt: If the Court please, if Counsel is endeavoring to prove the contents of the Regulations, we have them here. We suggest that the Regulations themselves would be the best evidence.

Mr. Ferguson: I am not challenging the Regulations. I want to see what is the thought behind that regulation, and what it imports as to maturity, because it says—

Judge Goodman: Counsel, you are arguing about it now. If you want the language of the regulation, Counsel offers it to you. It won't add anything to ask this witness if this is in the regulation. If it is in the regulation it is in the regulation.

Mr. Ferguson:

Q. All right. Mr. Poulsen, what I want to ask you is whether you can look at the avocado and select the least mature by looking at it?

A. You are asking if I can do it?

[fol. 122] Q. You and your staff.

A. In my experience I am not able to do it very successfully.

Q. Well, actually is there any way to determine oil content except by a chemical test, macerating the fruit, and subjecting it to a chemical test?

A. That is the way to determine it actually. The reference you are referring to, as reading from some document there, pertains to the visual evidences of relative percentage of oil content, including the cutting of the fruit.

Q. And size is considered then?

A. The what?

Q. The size is considered then?

A. As a general regimentation, you refer to, size being considered and as indicated in my previous answers here most lots or many lots of fruit have lower oil content in the smaller sizes as compared to the larger sizes.

Q. So size is a way you can judge maturity, is that right?

A. Size is an indication of maturity which is used and can be used in my opinion in an attempt to find the least mature fruit in a given lot of fruit.

Q. Now, reading from the present regulation, which is in the record of this case at page 75, the instruction is: "From the sampled fruit selected for testing individually test the least three mature appearing avocados." So the Inspector is supposed to be able to pick the least mature by appear-

[fol. 123] ance, is that right?

A. That is right.

Q. Then it goes on to say: "When two of these three tests are 8 per cent oil or better, and one of the tests shows less than 8 per cent, but not below 7.5 per cent two additional least mature appearing avocados from the sample shall be tested."

Now that is not in the law, is it?

A. That is not a law?

Q. The law says that you can't sell any avocado in the State of California unless it has 8 per cent oil?

A. This is the regulation you are referring to?

Q. But the regulation is not exactly the same as the law is.

Judge Goodman: Now you are asking him for a legal conclusion.

Mr. Ferguson: Well, it is obvious, of course, the regulation is not—

Judge Goodman: The regulation speaks for itself.

Mr. Ferguson: But this is secondary to the point that judgment is made according to size and external appearance.

Q. Mr. Poulsen, do you know anything about the size of Florida avocados?

A. No, I don't.

Q. Do you know how they compare with California avocados in size?

[fol. 124] A. Well, I can say this, as to some varieties of

Florida avocados I have seen, they have been quite large in relation to some California varieties.

Q. And wouldn't oil content have some mathematical relation to water content?

A. This I am not conversant with.

Q. Do you know personally of the instances in which Florida avocados were shipped here and rejected?

A. I know that some of them happened, but I don't know the details.

Judge Goodman: You don't have first hand knowledge? You weren't there and didn't see it done?

A. Judge, I was in the Department of Agriculture.

Q. No, I mean you weren't at the place where the avocados came in and were rejected?

A. That is correct, I was not.

Q. You got your information through channels?

A. Correct.

Mr. Ferguson:

Q. So you know nothing about the character of the fruit that was rejected other than the fact that it was reported to you that they did not test individually 8 per cent oil content?

A. That is essentially correct.

Q. That is all you know about it?

A. Yes.

[fol. 125] Mr. Ferguson: That is all.

Judge Bone:

Q. Mr. Poulsen, may I ask one question?

A. Surely.

Q. We might as well clear this up, I believe. Are all avocados, Florida importations and California avocados, subjected to the same style and type of inspection?

A. They are, Judge, except that there is no assurance in the present police enforcement set-up that all lots are actually inspected, at all times.

Q. Well, is it a sort of spotty inspection or is some little effort made to take the first look at the Florida avocados?

A. No, there is not that. We concentrate very definitely on the California avocados and when the Florida avocados are showing by the first tests made that they are mature, then less attention is paid to the Florida avocados. In other words, when it appears that a given variety is coming in at the time in a given size—

Q. One other thing: Do you know of your own knowledge what went on in the department as far back as 1925, what sort of importations came into California from the outside, of avocados?

A. Yes, Judge—not of my own actual contact with the marketing problems, because it wasn't quite at the level where I would be involved in that at that time, but I do know, from people in the department—however, this is [fol. 126] hearsay— that the marketing situation—

Mr. Ferguson: I am going to object. The witness has objected for me.

A. Yes, I did.

Judge Bone: Well, that may be covered later. It is 36 years old, this statute, approximately, and I just wondered if there was any history of it that was available to you, or if everything that is known about it now was just handed from father to son, and from predecessor to successor.

A. Judge, if I may go on, I believe there are some publications that carry some of this information.

Judge Bone: That is all.

Judge Goodman: Anything else, gentlemen, of this witness?

Redirect examination.

By Mr. Fourt:

Q. Mr. Poulsen, with respect to all varieties of avocados, in so far as inspection is concerned, as the inspection occurs, or occurred at times, is it usual to find the oil content of a particular variety increases?

A. Definitely.

Q. So at what period of the marketing of a given variety would the inspectors be likely to find fruit below the 8 per cent oil standard?

[fol. 127] A. In the first part of the season.

Judge Goodman: Does that conclude this witness?

Mr. Fourt: Yes.

Mr. Ferguson: There is one question I have.

Recross examination.

By Mr. Ferguson:

Q. Mr. Poulsen, do you know what is the first part of the season for any one variety of Florida avocados?

A. I have difficulty getting your question, Mr. Ferguson. Do I know what is the first part of the season?

Q. For any one variety of Florida avocados?

A. No.

Judge Goodman: That is all with the witness now, gentlemen?

Mr. Ferguson: Yes.

Mr. Fourt: Yes.

Judge Goodman: We will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until Wednesday, February 8, 1961, at 10:00 A. M.)

[fol. 128]

COLLOQUY BETWEEN COURT AND COUNSEL

Wednesday, February 8, 1961—10:00 A. M.

The Clerk: Case No. 7648, Florida Lime Growers, vs. Warne, et al., further trial.

Judge Goodman: All right, Counsel.

Mr. Fourt: May I see the interrogatories, Mr. Clerk?

If the Court please, we should like to offer in evidence as Defendant's Exhibits next in order the four interrogatories heretofore answered by the Defendant Corporations in this case, and have them marked.

Judge Goodman: Heretofore answered by whom?

Mr. Fourt: Yes, by the—we have four different interrogatories here. They have been answered by the two defendant corporations in this case.

Judge Halbert: Four different sets, you mean, Mr. Fourt, or just four interrogatories?

Mr. Fourt: Yes.

Judge Goodman: You mean the Plaintiffs?

Mr. Fourt: Yes, you are right, yes. Two sets of interrogatories to the Florida Lime Corporation and two sets to the South Florida Growers.

Judge Goodman: Are there a number of interrogatories?

Mr. Fourt: There are four of them.

Judge Halbert: There are four sets, there are two sets to each plaintiff in the case, as I understand it.

[fol. 129] Mr. Fourt: Yes. Is there any objection?

Mr. Ferguson: No. I assume the interrogatories became part of the evidence when filed, but if not—

Judge Goodman: I think we could take notice of them as a part of the record in the case without being offered in evidence, but you may offer them.

Mr. Ferguson: We have some interrogatories answered by the former director.

Judge Goodman: Give them a number, Mr. Clerk.

The Clerk: A, B, C and D.

Judge Goodman: A, B, C and D, all right.

(The four sets of interrogatories referred to were marked Defendant's Exhibits A, B, C and D in evidence.)

Mr. Fourt: May we have this document marked for identification?

The Clerk: Respondents' E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Judge Halbert: Is this another one?

Mr. Fourt: Yes. This is to be a Defendant's Exhibit, which Counsel for Plaintiffs has kindly stipulated may go into evidence without evidence of authenticity. It is a description of the leading Florida varieties of avocados

[fol. 130] and the production year by year and a percentage figure then in tabular form.

The right hand column of each page states, "Percentage of total crop," and counsel would prefer that that read "percentage of total shipments."

Is that correct, counsel?

Mr. Ferguson: That is right.

Judge Halbert: Is this what I was questioning Dr. Harding about yesterday?

Mr. Fourt: Yes.

Judge Goodman: This is the Florida avocados?

Mr. Fourt: Yes, this is the Florida. May it be marked in evidence?

Judge Goodman: It may be admitted as Defendants' Exhibit E.

(Document referred to was marked Defendants' Exhibit E in evidence.)

Mr. Fourt: May it please the Court, the Court may take judicial notice of the California regulations. We would like to have them before the Court in some manner. Should they be lodged or should we put them in as an exhibit?

Judge Goodman: Just put them in for the convenience of the Court. Is there a reference to the citation?

Mr. Fourt: Yes.

The Court: You have three copies, Counsel?

[fol. 131] Mr. Fourt: Yes.

Mr. Ferguson: These are already a part of the record. I think it is part of an affidavit.

Judge Goodman: He is just presenting them for the convenience of the Court, I take it, Counsel.

Mr. Fourt: Yes.

Mr. Ferguson: There is no objection, of course.

Mr. Fourt: There are two sets of regulations. Here is one and this is the other. (Handing to the Clerk.)

Judge Goodman: What is the effective date of these regulations?

Mr. Fourt: It would be several years past. I will provide the information this morning for the Court.

Judge Goodman: Are these the regulations that were in effect at the time of the events charged.

Mr. Fourt: Yes. These have been in effect at all times since January, 1954.

Judge Goodman: January, 1954?

Mr. Fourt: Yes. They were in effect before that, but at all times since January 1, 1954.

Mr. Ferguson: Counsel, isn't it true that the method for the determination of the oil content is unchanged?

Mr. Fourt: Yes, that is right.

Mr. Ferguson: And the method of selecting samples was changed at a later time, I think in 1957?

[fol. 132] Mr. Fourt: We will give the exact date of 1397.6.

Judge Goodman: So our record may be clear—

Mr. Fourt: Yes.

Judge Goodman: —the statute itself became effective in 1925?

Mr. Fourt: Yes.

Judge Goodman: From time to time various regulations, I suppose, were promulgated, describing the manner in which the regulations are enforced?

Mr. Fourt: The manner in which a sample would be taken, yes.

Judge Goodman: These particular regulations which you are now presenting were in effect at least since 1954 to date?

Mr. Fourt: That is my understanding.

If the Court please, one of the regulations incorporates an official bulletin of the Director of Agriculture which further describes the chemical process of oil extraction. For the convenience of the Court I would like to present this to the Court.

Judge Goodman: Have you three copies of that?

(Mr. Fourt handed documents to the Clerk.)

Mr. Ferguson: I suggest, Counsel, that you get the date of the change, and here is a copy of 101.

Mr. Fourt: We will get that for you.

Mr. Ferguson: I suggest you put that in also.

[fol. 133] (Discussion between counsel.)

Mr. Fourt: May we have this document marked as Defendants' Exhibit next in order?

The Clerk: Defendants' F.

(Document referred to was marked Defendants' Exhibit F for identification, being Copy of Complaint filed in Superior Court, Sacramento.)

Mr. Fourt: May it please the Court, we appreciate that the Court has indicated it is going to pass on the merits of the case and will do so very shortly.

We would like to inform the Court that the State has filed an action for declaratory judgment against these Plaintiffs in the Sacramento Superior Court, and such an action is pending. Now this is along with our thought that should the Court, in its discretion deem that there is adequate remedy in the State Court that then this might be the vehicle which the Plaintiffs might avail themselves of, and this is the only purpose.

This is a certified copy of the Complaint, and we would like to offer it in evidence.

Judge Goodman: When was that filed?

Mr. Fourt: It was filed August 17, 1960, in the Sacramento Superior Court.

Mr. Ferguson: I don't see how that belongs here.

[fol. 134] Judge Goodman: You just want to advise us that there is a case pending in the State Court involving the same parties?

Mr. Fourt: Yes.

Judge Goodman: In which the State is asking for declaratory relief against the Plaintiffs in this action?

Mr. Fourt: Yes, that is right, and involving the same issues as are presented in this petition.

(Discussion between Court and counsel.)

Judge Goodman: Now, can we just get with the evidence now, Counsel?

Mr. Ferguson: Perhaps at this time I may make a suggestion which may help to expedite the hearing, and that is regarding the deposition testimony and exhibits. My suggestion is that all questions of relevancy and materiality of this evidence and the exhibits 1 to 22, inclusive, can better be considered by the Court in the arguments of the case, and if this includes questions of admissibility they can be argued to the Court.

Judge Halbert: Mr. Ferguson, that is what we suggested yesterday, that we take this matter up and allow you to discuss this in your memorandums, not in your argument.

Mr. Ferguson: Yes. I am not asking counsel to waive any objections.

Judge Goodman: You have said that already, Counsel.

[fol. 135] Mr. Ferguson: That is fine.

Mr. Fourt: Shall I call the next witness, your Honor? Dr. Appleman.

DAVID APPLEMAN, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: David Appleman.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. David Appleman.

Q. And your address?

A. 545 Muskingum Avenue, Pacific Palisades.

Q. Your profession, sir?

A. I am a Professor of Plant Nutrition at the University of California.

Q. And what are your educational qualifications for that position?

A. Prior to that I had to get a Ph.D. degree.

Q. Did you obtain such a degree?

A. Yes, I did.

Q. And from which university?

A. From the University of California in the year 1935.

Q. And what was your specialty or major interest in that [fol. 136] degree?

A. Plant physiology and biochemistry.

Q. Have you engaged in research on avocados?

A. Yes, I have.

Q. And is this a part of your position at the University of California?

A. I utilize avocados for some of the work I am doing, some of the research I am doing, as a subject material.

Q. And when did you first commence your research on avocados?

A. In 1936.

Q. And has any of this research related to the development process of the avocado?

A. Yes, it has.

Q. And is this research related to the oil content of the avocado?

A. In the development of the avocado the oil is one of the substances that develops and changes during the process of development, and as such I have studied it.

Q. In your opinion is oil content a reliable index of avocado maturity?

A. In my opinion it is as good an index as we can have at present.

Q. And what is the basis for that view?

A. The basis of this view is practical experience. That is, by experience we have found that when the avocado [fol. 137] reaches a certain oil quantity it becomes edible. Prior to that it is not very attractive as a food.

Q. Is the 8 per cent oil test standard a reliable index of maturity?

A. It is as reliable as we—the best we can have at present.

Q. And what is the basis of that view?

A. Well, from our long years of experience we have found that when the fruit reaches that oil content, while there are no evident physiological changes as yet discovered, the fruit ripens normally; that is, it softens without shriveling, with darkening of the flesh, and it becomes attractive to the consumer.

Q. For commercial purposes is there a desirable period of time during which an avocado would soften after being picked?

A. Well, I would just generalize that if it takes an avocado from the time of picking to softening, say more than a time of 12 days, that is an indication that it has been picked prematurely. It should not take any longer than about eight to ten days.

Q. What would be the storage conditions during this 10 day period?

A. This is at storage room temperature.

Q. Would the period be longer if the fruit were refrigerated or cooled?

[fol. 138] A. I would expect so.

Q. What is the effect on a Lula avocado if picked at a 6 per cent oil content with respect to the period of softening?

Mr. Ferguson: There has been no question indicating that the witness ever made any study of the Lula avocado, and particularly Lula avocados grown in Florida.

Mr. Fourt: Yes. The Lula is a Florida variety.

Judge Goodman: You might qualify him.

Mr. Fourt: Very well.

Q. Doctor, have you reviewed the scientific literature on Florida varieties of avocados?

A. Yes.

Q. And particularly have you reviewed the work of a Mr. Stahl?

A. Yes, I have read his bulletins.

Q. Did that bulletin contain detailed studies of softening times and oil content?

A. It has studies on softening and on the physiological changes that take place in an avocado during growth and ripening, and I believe the studies are made by a person who is reliable. There is one criticism that is frequently made—

Mr. Ferguson: I am going to object. The witness is going ahead and telling about the work of Dr. Stahl in 1933.

Judge Goodman: Sustained.

Mr. Fourt: Thank you, your Honor.

[fol. 139] Q. Doctor, have you made a study of the fat content of avocados?

A. In my studies of development I have studied the fat content, yes.

Q. Is there such a thing as an unsaturated fat within the oil content of an avocado?

A. A large proportion of the fat in the avocado is unsaturated, I would say 85 to 92 per cent, something like that.

Q. Now, does this unsaturated fat have any relation to the development of cholesterol in the human blood system?

A. I am not in the medical field, but what I know from the literature—

Mr. Ferguson: Now wait a minute. He says he doesn't know, and he is not qualified.

Judge Bone:

Q. May I ask you on the term "unsaturated fat", we have heard so much about that on T.V. in connection with heart trouble: Is that a medical term or is it a chemical term?

A. No, it is a biochemical term. The medical men know very little about unsaturated fat.

Q. What is the so-called unsaturated fat? Satisfy my curiosity for a minute, will you?

A. Well, fat is made up—if you permit me a few moments—

Q. Oh, certainly, yes, and use curbstone english and then I will understand you.

[fol. 140] A. Fat is made up of two chemical entities. There is a glycerin molecule which consists of three carbons. To each one of these carbons is attached the chain which is known as the fatty essence—

Q. Well, keep it down to the curbstone english level.

A. Yes. Well, you can mention then you have three points, to which are attached long chains. Now, all fats have the same glycerin molecule. It is the glycerin you normally know from the drug store.

Now these fats are made up of 16 to 18 carbon units. In other words, if you consider a chain of 16 carbons attached to one another, and they can be attached either by a single bond—never mind at the present what a bond means, the bond has certain electrical properties,—or they can be attached by double bonds. In other words, you see two carbons are connected by two links. The connection of a carbon to another carbon by a double bond is called "unsaturation". It is unsaturated because whenever you connect two carbons with a double bond you have to take out a hydrogen atom from each one. Therefore they are lacking that hydrogen atom, and so they are unsaturated. So the

difference between the saturated and unsaturated, the unsaturated is less stable, and it is more active.

Judge Goodman: The unsaturated is less stable?

A. The saturated is more stable, the unsaturated is less [fol. 141] stable, and being less stable it is more active. Anything that is unstable is more active.

Judge Goodman: You mentioned activity. What is the activity?

A. The activity, it can react with other chemicals to a greater extent, in the process of metabolism it is more active there, and in the process of digestion and assimilation.

Judge Halbert: What is your field? What do you classify as your field?

A. My field is what would be called basic research. I am interested—

Q. No, I mean are you a chemist or a biochemist or a medical doctor or—

A. I am a biochemist.

Q. You are a biochemist, all right. It is my understanding from the little literature I have recently read that the world renowned man in this field is a Canadian who is only a biochemist, not a medical doctor. He works with Dr. White.

A. Charles White, yes.

Q. But the man, I have forgotten his name now. He is up in Montreal, I believe. He is a great researcher in this field?

A. Cuastel(?)?

Q. No, that is not the name. It is more common than that. I would say Dowd, but I don't think that is correct.

A. I don't know him.

[fol. 142] Q. Well, his picture was on Time three weeks ago.

A. Well, recently they have found that the unsaturated fats, the more active ones, are less likely to form cholesterol bodies in the blood stream. On the other hand, the saturated fats, the animal fats, like the fat you get in beef, and in other meats, which is usually saturated, is likely

to produce a greater formation of cholesterol bodies, along the walls of the arteries, and—

By Judge Goodman:

Q. And you say, to shorten this, that the fat in avocados is the unsaturated fat?

A. It is largely unsaturated. This is true of all plant fats, with the exception of palm fats, that is, from the palm tree.

By Mr. Fourt:

Q. Does the unsaturated fats have an effect on the saturated fats?

A. It is believed now by some nutritionists that if one consumes a certain amount of unsaturated fat he can then accommodate a greater amount of saturated fat.

Q. Doctor, is there a difference between growth and development in avocados?

A. Well, the physiologists always look upon growth and development as two processes, although they coincide, of course, and go along together; but by growth we mean enlargement in size, in volume, in weight. By development we mean differentiation for measurement of organs and [fol. 143] this sort of thing.

Q. Can the growth of an avocado be affected by applying nitrogen to the plant or to the tree?

A. It is believed by horticulturists, and I have seen some evidence of it myself, in the orchard, that when a high fertilization with nitrogen is given to trees they make a great deal of vegetative growth and less fruiting, and also if the fruits do develop they are likely to be larger and less developed in other ways.

Q. Will this treatment with nitrogen also affect the time of maturity?

A. I cannot answer that with certainty, but I would say that it might, because it would delay the development.

Q. Then is it possible that if a tree is given nitrogen development that the fruit might be large but immature?

A. It is very likely that in a tree in the lush state of growth, the fruit might be larger, but yet not reach the

same state of maturity as the smaller fruit on a less developed tree.

Q. Doctor, in your opinion is size a good index of maturity in the avocado?

A. I wouldn't think so. Not certainly early in the season. Late in the season it might be; but then, of course, there is no need of indices.

Q. Does the oil content in the avocado on the tree in-
[fol. 144] crease during the season?

A. Yes. On this I have personal data. The data is clear on this. I think from all the work that I have seen that the oil continues to increase to a point when the fruit is fully mature.

Q. And does the maturity of the fruit increase during the season?

A. Yes.

Q. A moment ago you referred to the problem of size being an index of maturity at the beginning of the season. What was your reason for stating that view?

A. Well, I could cite perhaps one experience I had in 1942. An assistant of mine checked 2000 fruits on the comparability of size. All the fruits were calipered to 2 centimeters, and then we proceeded at stated times to take samples of those same fruits and analyze them so we could see the development starting with fruits of the same size.

I would say that within about two months we already found differences in some of those tagged fruits as great as half a centimeter, which would mean percentagewise a rather large difference, and therefore it would indicate that fruits, even though we were starting with fruits of the same size, they do not necessarily grow at the same rate.

Q. Doctor, does the oil content of an avocado increase after the time it is picked?

[fol. 145] A. Our data, my own data would indicate that during softening there is a slight increase in oil, about 1 to 2 per cent.

I should state it more specifically thus: It is very difficult to determine this really accurately, because when you soften the fruit there is some loss of moisture. Now, what we have done, we have taken a fruit, cut it in half, paraffined one half of it, and let it soften, and analyzed the

other half, and calculating the oil on the original weight at the time when we cut it, and in these cases we have found a slight increase in oil in softening. We can't explain it. Work done in Australia, which I got recently from Robertson, indicates that there is also a slight increase in protein.

Mr. Fourt: You may cross examine, Counsel.

Cross examination.

By Mr. Ferguson:

Q. Dr. Appleman, you said that your studies of the avocado began in 1936. What was the nature of those studies in 1936 and subsequently?

A. At that time I was studying the development of the fruit from the time it was a small fruit to the time it matures. My purpose was simply to study the fruit physiology; that is, how it grows, what changes take place in the oil and the nature of the oil, and I have published one paper. Later on my work was not in that direction. My work primarily dealt with some enzymatic changes in the [fol. 146] fruit. It has nothing to do with maturity or edibility, or any of that phase; but as we studied the fruit, of course we have observed it as a by-product.

My work for the last eight years, I have used avocados simply as material. I could have used other materials, except that the avocado was more suitable for the work I have done.

Actually the work that I have done with avocados during that period was financed under a cancer grant, because it has some relationship to cancer studies.

Q. That is during the last eight years?

A. During the last eight years.

Q. Dr. Appleman, you are at U.C.L.A., are you not?

A. That is right.

Q. Didn't I call upon you at one time and talk to you?

A. You may have, I don't know. I have talked to a lot of people.

Q. I know, but if I called upon you did I not ask you if you were doing any work on the question of maturity of avocados?

A. Yes.

Q. And did you not answer "No" and refer me—

A. Yes, I did, yes, sir.

Q. —to the—

A. I would answer "No," now, I did not do work specifically on maturity.

[fol. 147] Q. Did you ever refer me to the citrus experiment station at Riverside which Dr. Wallace Sinclair is in charge and Dr. Rossi Bean—

A. That is right.

Q. —who was doing work on the question of maturity of avocados?

A. I would say that their work also is of a very fundamental nature, they rarely use the whole fruit. They take out the microcondria. Those are the particles within the fruit which control the respiration mechanism.

You can break a cell and take out of it the bit which is the engine which does all the work, and it is this particle they are studying, and I am also interested in, and so is Dr. Beale in our laboratory.

Q. Well, you do know that there has been a research project carried on—

A. Yes.

Q. —by Dr. Sinclair and Dr. Bean?

A. That is right, I am familiar with it.

Q. And has been in progress for several years?

A. That is right.

Q. Is that not because the 8 per cent oil content has been found to be an unreliable, unsatisfactory standard of maturity?

A. I cannot answer that. That is, I have not seen the [fol. 148] official project. I speak to Dr. Bean frequently and to Dr. Sinclair. I know the work that is going on.

Q. Did you read what they have written on the subject?

A. On maturity?

Q. Yes.

A. No, I haven't.

Q. Now you say that at some time for some purpose analysis was made of samples of the fruit. You are aware, are you not, that there are many varieties—

A. Yes, I am.

Q. —of avocados. In California, how many?

A. Oh, maybe two dozen, or something like that. I don't know exactly.

Q. Do you think it is nearer 300?

A. It may be, that is, if taken all together. I am speaking only of commercial.

I may say at the beginning, so as to save a lot of questions, I am familiar with two varieties, all the work that I have done has been with only two varieties.

Q. And those varieties?

A. The Haas and the Fuerte.

Q. Doctor, you said something about certain samples, and upon the basis of those samples expressed an opinion. Have you any record of those samples and when they were analyzed?

A. Yes. I have a record with me of some unpublished data [fol. 149] which may be of interest to the Court.

Q. Now you say the Fuerte and Haas?

A. Fuerte and Haas.

Q. Have you the dates when they were picked and analyzed?

A. Yes, I have all the information. The date they were picked, the date analyzed; all the information is given in the data I have. If you wish to see it, I would be glad to show it to you.

Q. Well, I will ask you a question and if you wish to refer to your data that is all right. The question is this: You said that at the date of picking of a certain number of samples, that they were of different sizes, and some of them were mature and some not mature.

A. I don't recall having said anything to that kind of effect.

Q. Well, Counsel asked you if size—

A. Yes.

Q. —was a criterion of maturity.

A. Yes.

Q. And you answered that of the samples some mature and some were not mature. Now if you w.... to refer to your data—

A. Yes.

Q. —I want to know whether there was any difference in

the state of maturity, in your judgment, in correlation with [fol. 150] size of the samples.

A. Yes. May I state the basis of my statement on this?

Q. Yes.

A. I have indicated that I have tagged fruit of a certain size, two centimeters to begin with. Subsequent to the tagging I have sampled them periodically, sometimes twice a month, most of the time once a month. Now, starting with the same fruit, as I have sampled them, the sizes varied. They did not all increase at the same rate. So that two months later when they were, say, four centimeters in diameter, and five, some were four, and some were five, of the same fruit that were two at the beginning.

They did not vary very much in their composition, even though the size varied considerably.

Q. That is what I am getting at, Doctor. You say you followed the size, and the increase in size from time to time. Now if you did that—did you do that over a period of years?

A. Well, that was done—well, this experiment was in 1941 and 1942. I have a published paper, and I think—

Q. No, I am talking about your own research.

A. These are both my own research.

Q. 1941 and 1942?

A. There is another one that is a little earlier. I don't have the date, but there is a published paper—let me see if I can find the date. It is similar. This is a year or a little over a year's work.

[fol. 151] Q. Well, Doctor, let me put to you this question,—

A. Yes.

Q. If from season to season you observe the development in size, say weight or measurement, would you thus arrive at a determination that that particular variety of fruit at a certain size would mature?

A. I don't think I would, because I don't think there is that exact relationship between size and maturity.

Q. You say there is no relationship?

A. No exact relationship where I could say that a fruit of a certain size has matured. I cannot say that. I can say that a larger fruit, or a fruit when it becomes larger

is more likely to be matured than a fruit when it is very small. But I can't say that a fruit is mature from size.

Q. Well, if you say that by study of a particular variety—

A. Those are for the two varieties. Whatever I say is based on the two varieties. I want you to be clear on that.

Q. All right. Do you know anything at all about Florida avocados?

A. I don't know anything about Florida avocados. We have trees of this variety in our orchards, and I have seen them, but I have never studied them.

Q. Have you ever eaten one?

A. Yes, I think I did on one occasion. Not one grown in Florida, but a Florida variety grown in California.

[fol. 152] Q. Now, Doctor, there are different races of avocados, are there not?

A. I know there are. I am aware of that.

Q. And what race of avocados preponderantly are grown in California?

A. What races?

Q. Yes.

A. We have all the three races.

Q. Well, I am asking you the Fuertes and Haas, the main ones?

A. The Fuerte is considered a hybrid, and because of the smell of the leaves I think we can consider it is Mexican, but I don't think it has been agreed upon.

Q. Well, don't you know as a fact that the parent plants came from a particular place in Mexico?

A. I don't know that. I am not a horticulturist, and I am not familiar with this fact. As I said, to me, the problem—

Q. Well, you have answered as to the Fuerte. That is a Mexican name, isn't it?

A. Yes.

Q. What is your answer as to the Haas. Is that also—

A. I don't know. I think it was a seedling isolated from a Fuerte growth, as I recall, but I cannot be sure of that. As I say, I am not a horticulturist.

Q. Do you know what race or races the Florida avocados are?

A. The which?

[fol. 153] Q. The Florida avocados.

A. Yes, we have all the three races represented, from what I gathered from reading Stahl's bulletins on the matter.

Q. Is the 1933 writing of Dr. Stahl all that you have ever read about Florida avocados?

A. Oh, I have read now and then a little, but that is about all I have. I have read horticultural literature, and as I started in to say, I have high regard for Dr. Stahl's work—

Judge Goodman: You have answered the question, you have answered the question. You are getting now into a field of cross examination that was not covered on direct.

By Mr. Ferguson:

Q. Do you know what avocados Dr. Stahl tested?

A. He tested about—I can't recall exactly, but certainly about 25 or 30 varieties are given.

Q. Do you know what samples he tested?

A. Yes, I assume—

Judge Goodman: What is the materiality of this?

Mr. Ferguson: Counsel asked him—

Judge Goodman: No—

Mr. Ferguson: Very well, your Honor, I will withdraw the question.

Judge Goodman: Just be quiet a moment, will you, Counsel? The witness was not interrogated about anything [fol. 154] to do with Florida avocados. He said he doesn't know anything about them, and never examined them, and what information he is now giving you is from literature that he has read, is that correct?

A. That is right.

Judge Goodman: So that is immaterial.

Mr. Ferguson: I have withdrawn the question.

The Witness: If I may complete the statement, if you will permit me to—

Mr. Ferguson: I will ask another question.

Judge Halbert: We are not interested in it, Doctor.

By Mr. Ferguson:

Q. You say that in speaking about oil content and the 8 per cent standard—now I understand you are talking only about the Fuerte and the Haas?

A. That is right.

Q. Do you know to what oil content these two varieties run at maturity?

A. I have had myself the experience of seeing Fuertes growing up to 26 per cent, on a fresh basis.

Q. And the Haas?

A. The Haas comes fairly close to that, 24 or 25. That is at the highest state of maturity, when they are almost approaching senescence, old age.

Judge Halbert? Is that like a person getting senile?

A. That is right. Both go through the same phenomena.

[fol. 155] By Mr. Ferguson:

Q. Do you mean that this oil content is a long time after picking?

A. No, this is—a fruit at that high oil content will not be in any good shape more than four or five days after picking when it reaches that high in oil content. It is so far advanced in senescence that it will soften very rapidly and will disintegrate or become useless in a very short time.

Q. Doctor, can you say as to the Fuerte and the Haas, and you say they are similar as far as oil content is concerned—what is the level of oil content at the usual picking time?

A. Now, I don't—

Q. Well, let me ask you: Are they picked at 8 per cent oil content?

A. They are. At least that is the aim.

Q. Well, that is permitted.

A. That is permissible, yes.

Q. Well, do you know as a matter of fact, anything about the marketing of these avocados?

A. Not very much, no.

Q. Do you know when the growers pick them?

A. When can they pick them?

Q. No, not when they can pick them, but when they do pick them, as a matter of commercial handling.

A. Well, I have been to the Calavo because they frequently supply the fruit, and I have seen how they handle [fol. 156] them, but I don't know the details of when or how they pick them, or anything of that sort. That is not my field.

Mr. Ferguson: I think that is all of this witness with that answer.

Judge Goodman: Is that all of the witness?

Mr. Fourt: Two questions, your Honor.

Redirect examination.

By Mr. Fourt:

Q. Doctor, does the Fuerte variety avocado mature at 8 per cent oil content?

A. What do you mean by "mature," I would like to know. That is a word that is hard to—

Q. Yes. In the sense of—

Judge Halbert: Maybe you ought to read the definition of maturity in this book here. It says when an avocado is ripe it is mature and when it is mature it is ripe.

By Mr. Fourt:

Q. Doctor, is there an understanding of the term "mature" in a commercial sense of what an avocado is when it is mature, as a commercially valuable property?

A. In a commercial sense it is a term that is practical. It has no theoretical basis as far as physiological maturity or anything of that sort. I may indicate one thing which may be of interest to the Court. The recent studies by Dr. Beale studying fruits at different stages of growth, starting in with even very small fruits and going on up to ma- [fol. 157] turity and studying the microcondrio behavior—that is, the respiration of the microcondrio particles, he found that up to a certain point—if the Court would permit, I would like to go into this detail. It may have some bearing on the case.

Judge Goodman: Well, I don't know—

Judge Halbert: Doctor, it is going right over our heads, and right along the wall and out the door.

Judge Goodman: I don't see the materiality of this redirect examination so far.

Mr. Fourt: All right.

Q. In the commercial sense of the term is a Fuerte avocado mature at 8 per cent oil content?

A. I would say at 8 per cent oil content it softens to an acceptable state of edibility.

Q. Is the Fuerte—

Judge Goodman: You mean it is ripe?

A. It is ripe to eat. I would say personally I would like an avocado with 12 per cent oil to eat.

By Judge Halbert:

Q. Twelve per cent?

A. Yes. That is much better than one of 8 per cent.

Mr. Fourt: Thank you.

Recross examination.

By Mr. Ferguson:

Q. One question, Doctor: Do you have any record of Fuerte avocados at 8 per cent oil content that you deter- [fol. 158] mined to be mature?

A. What is the question?

Mr. Ferguson: Will you read the question, Mr. Reporter?

(Question read by reporter.)

A. Well, as I have indicated, the term "mature," if you mean by "mature" edible—I don't like to use "mature". By "maturity" what do you mean? In speaking of an animal or a plant it means it is ready to reproduce, and this does not apply to this case, of course.

Mr. Ferguson: I will adopt your suggestion and change the word to the word you used, "edible" or "palatable."

A. Yes, I would say that we have found that at 8 per cent it becomes edible, and as I have indicated—

Q. Doctor, I asked you specifically whether you have any record of such test and determination?

A. I have a record of softening, and I have indicated here on my record—this is done on two successive years—that when it has reached 7.92 per cent oil the fruit ripens but shrivels badly.

The next time when it had 9.85 per cent oil it ripened in 12 days. This is still really not—I would say that 8 per cent oil is about the lowest limit at which it would ripen and still be edible. If I was to set a standard for my own use I would say perhaps higher, for the Fuertes and the Haas. I would like it to be clear when I speak of avocados I mean [fol. 159] the Fuertes and the Haas.

Judge Goodman: Anything else? That is all.

Mr. Fourt: Mr. Wiggs, please.

Presley Wiggs, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: Presley Wiggs.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. Presley Wiggs.

Q. And your address?

A. 549 Segovia Avenue, San Gabriel, California.

Q. Your occupation or profession, sir?

A. I am Assistant General Manager of Calavo Growers of California.

Q. Can you briefly describe your duties in that position?

A. I am primarily engaged in the market division of our organization.

Q. How long have you been an employee of Calavo?

A. Since March of 1931.

Q. In the course of your employment have you ever been associated with the marketing of Florida avocados?

A. Yes, I have.

[fol. 160] Q. And when was this experience first commenced?

A. Starting in about 1939 up until 1957.

Q. And would you briefly describe that experience?

A. I was headquartering in Texas, in San Antonio, Texas, and I had supervision of four offices, offices at Dallas, Houston, San Antonio and Juarez, and we handled Florida avocados during those seasons from those points.

Q. During the same period of time did you also have anything to do with the sale of California avocados?

A. Yes, I did.

Q. During this period of time were both Florida and California avocados sold?

A. There is an overlapping of the seasons, Florida avocados and California avocados.

Q. In the marketing of avocados is there a term called the "trade"?

A. Would you restate that?

Q. Yes. In the marketing of avocados is there a term "The trade"?

A. Yes.

Q. What is meant by "the trade"?

A. The wholesalers, the chains and the retailers.

Q. Are avocados purchased by the consumer purchased in a hard or soft form as a general rule?

A. As a general rule they are purchased in a hard form.

[fol. 161] Q. As a general rule does the wholesaler or retailer purchase avocados in the hard or soft form?

A. As a general rule both purchase avocados in the hard form.

Q. And for what reason would the wholesaler or retailer purchase avocados in the hard form?

A. It is a lower risk if they purchase in a hard form, because in the trade a wholesaler who has soft or breaking avocados, as we call them—that is the state between hard and table ripeness—such wholesaler might lose his profit because he has less time in which to dispose of his inventory.

Q. In the ordinary case what period of time would that be?

A. That varies considerably with the variety of avocado.

Q. Does that time vary as between the West Indian variety and the hybrid variety?

A. Yes, it does. In my experience the ripening of West Indian varieties, such as Fuchs, Pollocks, Trapps and Waldins, is a good deal faster than the hybrid varieties of Florida, such as Booth 7 and 8, Lula, and such varieties.

Q. What happens in marketing sense when the avocado is picked at an unripe or immature state?

A. May I have the question again?

Q. Yes. What occurs when an avocado is picked at an immature unripe stage?

[fol. 162] A. Quite often the fruit shrivels and will only soften to a semi-soft state or rubbery state.

Q. What is the flavor of such an avocado in this rubbery state?

A. Generally not satisfactory to the consumer.

Q. What is the effect on the market if avocados which develop this rubbery state are sold?

A. In my experience I would say that it has a detrimental effect on the sale of avocados in general, in that the consumer does not receive satisfaction from the avocado purchase and therefore she is hesistant to buy again.

Q. In your experience will this affect repeat sales of further shipments of avocados in that market?

A. It will affect it adversely.

Q. Is there a seasonal nature to the market for avocados in California?

A. Yes, there is. There are peaks and valleys in production and consequently in sales. The peak of the California season usually is in February, about now, February and March, and the valley or the low point in production and sales is usually during the period September, October and November.

Q. Are there price variations in avocados in California?

A. Yes. Price varies considerably, depending on the volume or tonnage of avocados offered on the market.

Q. What are the prices now for grade 1 fruit in the Los [fol. 163] Angeles market, freight on board Los Angeles?

A. F.O.B. Los Angeles prices now range $2.75 for $3.00 for a 13-pound net weight container.

Q. What was the price of similar Grade 1 quality avo-

cados, free on board Los Angeles, in September and October of last year?

A. Of 1960?

Q. Yes.

A. It ranged from $4.50 to $5.50 for No. 1 fruit.

Q. When ordinarily does the price break occur after the September-October period?

A. It usually coincides with the maturity of the Fuerte season; approximately around the middle of November and from there on. As the Fuerte fruit matures the tonnage or volume offered on the markets increases materially.

Q. And what effect does this increase of volume have on price, if any?

A. It has a depressing effect on price.

Q. Does Calavo market any variety of avocados containing approximately 8 per cent of oil content?

A. Yes.

Q. And during what season of the year would that occur?

A. Well, it occurs in various seasons as the various varieties reach maturity of 8 per cent. Some varieties mature in the fall, some in the spring, some in the late summer. [fol. 164] Q. Does Calavo market a Fuerte variety at 8 per cent?

A. Yes.

Q. Has Calavo had lots of fruit inspected and rejected by the California Department of Agriculture in the course of its operations in California?

A. We have had some rejections by the State Department of Agriculture, because of low oil content.

Q. In your opinion is the 8 per cent oil standard effective in keeping immature fruit off the market?

Mr. Ferguson: I am going to object to that. I don't know what basis or factor there is here for such a question. He is not asking him now what he did about anything.

Judge Goodman: Overruled.

Mr. Fourt: You may answer.

A. In my opinion the 8 per cent oil content standard is effective in keeping immature fruit off the market.

Q. In your opinion is it commercially profitable to market

West Indian varieties of avocados grown in Florida in California?

A. In my opinion it would not be commercially profitable to market West Indian varieties grown in Florida in California. The best or shortest in transit time that you can expect by refrigerated truck from Florida to California is five days. If fruit on that truck were pre-sold you would probably have another two to three days—it would [fol. 165] take probably another two to three days to dispose of that fruit. If it was not pre-sold before the shipment arrived in California it would take five or more days. This, plus the transit time of a minimum of five days I believe would result in fruit which would not give satisfaction at the retail level.

In my experience I have noted a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage. In other words, after the cold has gone out of the fruit. From that point on they ripen quite fast.

So that the retailer, who is primarily interested in making a profit, does not have sufficient time to turn their merchandise and make a profit.

Q. What is the form of the shipments from Florida to California? That is, what mode of conveyance is used?

A. As I indicated the fastest mode is by truck.

Q. Are these trucks cooled or refrigerated?

A. They are refrigerated.

Mr. Fourt: You may cross examine.

Judge Goodman: We will take a brief recess.

(Recess.)

Cross examination.

By Mr. Ferguson:

Q. Mr. Wiggs, you say when you joined Calavo you were [fol. 166] in Texas?

A. No, I joined Calavo in Los Angeles.

Q. And you were assigned to one of the offices?

A. In Texas, that is right.

Q. How many offices does Calavo have?
A. We now have twenty.
Q. I thought you had as many as 33?
A. We did, at one time.
Q. You sell avocados all over the country, do you not?
A. That is right.
Q. And you have sold Florida avocados?
A. Yes, sir.
Q. In what years did you have something to do with the sale of Florida avocados?
A. Well, I had to do with the sale of Florida avocados continuously when in season from 1939 on in the southwest part of the United States.
Q. And did you have experience in selling Florida avocados in California in some year?
A. Not personally, no.
Q. You know that your company did?
A. Yes, from 1952 until 1958.
Q. I have some figures here. Will you tell me whether it is approximately correct. That in a series of years 1951-'52, 1952-'53, 1953-'54, 1954-'55, Calavo Growers of [fol. 167] California sold well over a million dollars of Florida and Cuba avocados in those years?

Mr. Fourt: If the Court please, I believe this is going beyond the scope of the cross examination and he should make the witness his own for this purpose.
Judge Goodman: This is in California you are talking about?
Mr. Ferguson: That they sold in any place. Any place. He has expressed an opinion about the handling of these avocados, and this goes to the direct examination on that point.
Judge Goodman: Overruled.

Mr. Ferguson:

Q. Do you still have the question in mind?
A. Yes, sir. I have our own auditor's figures. He started with the 1951-'52 season.
Q. Those are the ones that I happen to have.
A. It was over $940,000 in that season.

The next season, $1,109,000.

The next season, 1953-'54, $898,000.

1954-'55, $999,000.

Did you go beyond '54-'55?

Q. No, I didn't, but if you wish to add some other years go ahead.

A. I will just answer your question to that point.

Q. Well now, do you know what varieties of Florida avo-
[fol. 168] cados you handle?

A. Yes, sir.

Q. What varieties?

A. You are talking about the United States as a whole?

Q. That is right.

A. We have handled Fuchs, Pollocks, Trapps, Waldins, Booth 3, 7 and 8, Lulas, Taylors, and I am not sure whether we handle any Wagners.

Q. You know, of course, that Fuchs, Pollocks, Trapps and Waldins are so-called West Indian avocados?

A. Yes, I do.

Q. And you may have named some others which I didn't catch. And isn't it true that all avocados that come from Cuba are West Indian?

A. That is my understanding.

Q. Now when did you sell these avocados?

A. You are talking about Florida avocados now?

Q. Yes, talking about Florida avocados.

A. We sell Florida avocados generally over the entire country. Prior to 1952, as indicated, we did not sell Florida avocados in California prior to 1952.

Q. Will you name some cities where you had substantial sales of these avocados?

A. Washington, D. C., New York, Boston, Cleveland, Chicago, Kansas City, Atlanta, New Orleans, Houston, San Antonio, Dallas, Denver, Salt Lake City, Phoenix, El Paso, [fol. 169] Seattle, Portland, San Francisco—no, leave out San Francisco as a major.

Q. Now, to pick out a city, what is the time of transportation of the Florida avocados to Chicago?

A. About two and a half days, 60 hours.

Q. How about Kansas City?

A. About the same.

Q. How about Denver?
A. About three to three and a half days.
Q. And Phoenix?
A. About three and a half days.
Q. Well, you named El Paso, what about that?
A. Three to three and a half days.
Q. And how are they shipped?
A. Mostly by refrigerated truck.
Q. Well, of course it is a fact while under refrigeration the ripening process is slowed down to a negligible point, isn't that right?
A. That is correct.
Q. And you gave the time for transportation to California as five days. Is it five full days.
A. Generally speaking.
Q. And sometimes less?
A. Well, you might get a truck to come in in four and a half days. Now this, as I indicated earlier, is the minimum [fol. 170] time.
Q. Now you say that Calavo has had some rejections of avocados for sale in California because of less than 8 per cent oil content?
A. Yes.
Q. Of what varieties?
A. Of several varieties, Choquettes, Itzamnas, Fuertes.
Q. Fuertes?
A. Fuertes, Navals.
Q. Do you have any records to show at what time of the season you had some rejections of Fuertes?
A. I presume we do.
Q. You have it with you?
A. No, I don't.
Q. How does Calavo determine when to market Fuertes?
A. In our laboratory at Escondido Packing House, we have several employees who are engaged in continuous tests measuring the oil content of samples that are sent in by the growers.
Q. Is that all you do about it?
A. We cannot market them legally below 8 per cent.
Q. I understand that, but I am asking you is that the only determinant that you use?

A. Yes, as far as I know.

Q. You mean that when you offer them for sale you do [fol. 171] so only on the basis of oil content?

A. That is correct.

Q. Do you sell your Fuerte avocados when they reach 8 per cent oil content as a matter of general marketing practice?

A. We start havesting them when they test 8 per cent or better.

Q. And you consider nothing but oil content?

A. That is correct, unless you are talking about grading, outward grading standards.

Q. Well, you do consider some other things. What do you consider?

A. Well, as is the practice in the produce industry we grade avocados as to their external appearance; within a certain tolerance grade No. 1 established; a lower tolerance, grade No. 2, and still lower tolerance, grade No. 3. Culls are not permitted to be sold in fresh fruit channels.

Q. What factors are included in that judgment?

A. In the grading?

Q. When you think they are ready to be sold.

A. We have trained graders on the grading tables who select those fruits which we consider are No. 1 grade, those fruits which we consider No. 2 and those which we consider No. 3.

Q. May I ask you have you personally ever been in that part of the work?

A. I have never actually done it. I have been in the packing house many times and seen it done.

[fol. 172] **Judge Halbert:**

Q. Mr. Wiggs, does the State of California have anything to do with this grading process?

A. Not the grading process. They do have a lot to do with the oil content.

Judge Halbert: Well, that is what I am getting at. I am wondering if we are not getting into a field here that we are not particularly concerned with?

A. There are no grading standards on avocados set by the State of California.

Judge Halbert: Only this 8 per cent oil content?

A. Only the 8 per cent. They maintain an inspector almost continuously in our packing house.

Judge Halbert: In other words the State polices you for the 8 per cent, and you police yourselves as to whether or not they are good looking avocados, whether or not they are deformed or damaged, and all that?

A. That is right, scars and cuts.

Judge Halbert: You do all that yourselves?

A. Yes.

Mr. Ferguson: Thank you, your Honor, you do it so much better than I.

Judge Bone:

Q. The rejection of avocados falling below the 8 per cent is applied equally to California as well as other types of avocados?

A. Yes, sir.

[fol. 173] Q. What I am getting at is there is no selection of any particular place of origin to apply this 8 per cent standard?

A. No. Florida avocados would be tested for their oil content.

Q. Well, would they booted out of the market as summarily as other avocados from Cuba or somewhere else?

A. Yes, they would. The shipper or handler is given an opportunity to regrade.

Q. Well, that is just a problem which, of course, gets into this picture, and I am curious about it.

Mr. Ferguson: We do not claim any dishonesty in the enforcement.

Judge Bone: What is that?

Mr. Ferguson: We don't claim any dishonesty in the enforcement.

Judge Bone: Well then, maybe it is a good thing I asked the question. We eliminate any question about dishonesty, then.

Mr. Ferguson: We say that it is inherently discriminatory.

Judge Bone: That it is what?

Mr. Ferguson: It is inherently discriminatory.

Judge Bone: Well, of course as long as I can remember in the law game, which goes back a long time, if there is difficulty of some compromise in the core between the [fol. 174] Federal Government in Interstate Commerce and the police control of the State, it has been an unending argument, I can't recall when it wasn't, and how they will ever compromise it on some acceptable basis is what puzzles me. I am not going to live long enough to see it. Maybe you folks will, but I won't.

Mr. Ferguson: There is no doubt in the long history of Court decisions dealing with that problem, which is a basic problem in our constitutional system.

Judge Bone: That is right, but of course the States cannot surrender the police control entirely to the Government.

Mr. Ferguson: But it can be taken away from them in various respects when the National Government enters the field.

Q. Now, Mr. Witness, you said that you start marketing Fuertes and other varieties at a certain time of the year?

A. Yes.

Q. And you have observed that from year to year, is that right?

A. That is right.

Q. And is it about the same time each year?

A. Approximately. I can cite a very recent example. This year's crop of Fuertes, for example, is approximately six weeks later than last year's crop of Fuertes at the start of harvesting.

Q. Isn't that an unusual difference, six weeks?

[fol. 175] A. Yes, it is.

Q. Wouldn't the normal difference be a week or two?

A. Within that range.

Q. And you said that the lowest supply of California avocados comes in the fall months, late summer and fall, September, October, November and December, is that right?

A. I don't believe I said December.

Q. Oh, you do not say December. Well, I will limit my question then to September, October and November.

(Witness nods in affirmative manner.)

Judge Halbert: You nodded your head. You have to answer audibly. Your answer is "Yes"?

A. Yes.

Mr. Ferguson:

Q. And that is true from year to year, is it not?

A. Yes.

Mr. Ferguson: That is all of this witness.

Judge Goodman: That is all of the witness?

Redirect examination.

By Mr. Fourt:

Q. Mr. Wiggs, during the time that you were in the southwest was the Calavo Growers organization the marketing agent for South Florida Growers, Inc.?

A. Yes, it was.

Mr. Fourt: That is all.

Judge Halbert: Mr. Wiggs, perhaps it would be well [fol. 176] for the record—I know, but I don't know whether the record knows what Calavo is?

A. Calavo Growers of California is the Marketing Agency for a group of Avocado growers in California. It is a co-operative, a farmers' cooperative organization.

Recross examination.

By Mr. Ferguson:

Q. I would like to put one question: You have answered that Calavo Growers was selling agent for South Florida Growers Association in 1939. What about later years?

A. Continuously until 1958.

Q. You sell the avocados of that company in every State of the Union?

A. Yes.

Mr. Ferguson: All right, that is all.

Mr. Fourt: Mr. Jones, please.

ALBERT C. JONES, called as a witness on behalf of Defendants, sworn:

The Clerk: Your name, please?

The Witness: Albert C. Jones.

Direct examination.

By Mr. Fourt:

Q. Your name?

A. Albert C. Jones.

[fol. 177] Q. Your address?

A. 1006 North Ferndale, Fullerton, California.

Q. Your present occupation or profession, sir?

A. I am Sales Manager for Western Fruit Growers Sales Company of California.

Q. Have you had experience in the marketing of Florida avocados?

A. Yes, I have, dating back to 1951.

Q. And who was your employer at that time?

A. Calavo Growers of California.

Q. And in which areas of the United States did you have this experience?

A. The southwest area, which included at that time the northeast portions of Texas, New Mexico and Arizona, and later in California.

Q. Are there several varieties of Florida avocados?

A. Yes, there are.

Q. And would you name a few of these varieties?

A. Well, there is Fuchs, Pollocks, Waldins, Hickson, Taylors, Lulas, and of course the Booths, of which there are about three different types, ones, threes, eights, and so forth.

Q. Do shipping qualities vary between the Florida varieties of Avocados?

A. Yes. From a working experience I would say that they [fol. 178] definitely do.

Q. And which varieties are the best shippers?

A. I found the Booth varieties, particularly the Booth 8 and the Lula variety, and the Taylor varieties are probably the outstanding ones.

Q. And which varieties were the poorer shippers?

A. Well, as it has been classified here today, I would say the West Indian varieties as a group.

Q. Would you name those varieties?

A. Well, that again would be the Fuchs, Pollocks, Waldins, Hicksons, and one or two others that I have since forgotten.

Q. In your opinion is it commercially profitable to market West Indian varieties in California?

Mr. Ferguson: I am going to object to that. It couldn't be the same at all times. It would depend on the market what the price is. How can it be stated without limiting it to a specific period? If the crop is an over-abundant year and the price is way down, of course it isn't profitable. If the price is attractive—

Judge Goodman: Well, you are arguing, Counsel. You can cross examine him on that.

Mr. Ferguson: The question is not limited in any way in relation to market.

Judge Goodman: It has to be limited to the period in which he had experience. Overruled.

[fol. 179] Mr. Fourt: Mr. Reporter, would you read the question back?

(Question read by reporter.)

A. Again from a working knowledge I would say that due to arrival conditions, which unfortunately were generally not altogether good on the West Indian varieties, as a shipper I would certainly hesitate before shipping West Indian varieties into California.

Q. Would you give an example of personal experience that you had with regard to the West Indian varieties and the shipping conditions?

A. Well, the point that we run into from a marketing standpoint, of course, is the length of time the retailer would have to market or sell the fruit, and of course we run up against considerable opposition if the fruit will not hold up or have what they call at least a normal shelf life, and this results in considerable losses at the retail level, and therefore a resistance is built up not only for this particular variety of avocado but all avocados. So again from a marketing standpoint I would hesitate to market them.

Q. Were losses sustained in the marketing of West Indian varieties in your personal experience?

A. Pardon me?

Q. Yes. Were marketing losses sustained in your per- [fol. 180] sonal experience in the marketing of the West Indian varieties?

Mr. Ferguson: I would object again as not related to any particular shipment. There is no evidence yet that this witness ever handled West Indian Florida avocados in the State of California.

Judge Goodman: I thought he said he did.

Mr. Fourt: In the Southwest, I believe.

Judge Halbert: And he said "later in California," as I understood it.

A. Yes, I did.

Judge Halbert: He said part of Texas, New Mexico, Arizona, and later in California.

Mr. Fourt: Thank you, your Honor. Mr. Reporter, would you read the question, please?

(Question read by reporter.)

A. Yes, there were. Now to the degree, percentagewise or actual dollars or cents, I naturally cannot point that out; but again it relates back to the fact that they were severe enough to result in considerable opposition to buying Florida avocados, one, and even other avocados as a result of this.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Jones, I will put you the question: Did you ever sell any West Indian Florida avocados in the State of [fol. 181] California?

A. Yes, I did.

Q. And which ones?

A. I sold the Booth and the Lula and the Taylor varieties.

Q. You think they are West Indians?

A. Oh, no, they are not, they are hybrids. I beg your pardon.

Q. Now, I remind you the question was limited to the West Indian variety.

A. Yes, that is right. Not in California.

Q. Never sold any in this state. You say you have had marketing losses. All avocados are perishable, are they not?

A. Very definitely.

Q. Very definitely. So if you don't make a prompt sale you are going to have losses?

A. That is true.

Q. True of every variety of avocados, is it not?

A. No; the length of life of avocados have a considerable bearing on that.

Q. All right, you might have a day or two longer, but if you didn't sell them you would have losses?

A. True.

Mr. Ferguson: That is all.

Judge Goodman: Is that all of this witness?

[fol. 182] Redirect examination.

By Mr. Fourt:

Q. One question. Mr. Jones, is the problem in the West Indian varieties having a short shelf life aggravated if the variety has to be hauled a long distance?

Mr. Ferguson: I am going to object. Counsel said something about shelf life, but we haven't heard it from the witness.

Judge Halbert: That is just what he got through testifying to, that was an important factor, the shelf life of the fruit?

A. Yes, I mentioned that.

Mr. Ferguson: He has also testified that he never handled any in California.

Judge Goodman: Well, of course, what you are asking him is sort of self-evident.

Mr. Fourt: Very well. No further questions.

Mr. Whipple, please.

S. R. WHIPPLE, called as a witness on behalf of Defendants,—Sworn:

The Clerk: Your name?

The Witness: S. R. Whipple.

Direct examination.

Mr. Fourt:

Q. Your name?

[fol. 183] A. S. R. Whipple.

Q. And your address?

A. 3441—13th Street, Sacramento.

Q. Your profession or occupation, sir?

A. At the present time I am chief of the Bureau of Fruit and Vegetable Standardization in the State Department of Agriculture.

Q. Do these duties have any relation to the inspection of avocados in California?

A. Yes, they do.

Q. Will you briefly explain those duties with respect to this limited field?

A. The duty particularly with avocados is to supervise the work of the Agricultural Commissioners and their staffs, and representatives of our Bureau in the testing of avocados in California.

Judge Halbert: Is Mr. Whipple going to testify to something that Mr. Poulsen has already covered?

Mr. Fourt: No; we will cover a different area.

Judge Halbert: I don't know how my brothers feel about it, but I am not interested in any repetition of this here or any cumulative evidence.

Mr. Fourt: Yes, your Honor.

Q. Mr. Whipple, are you acquainted with the equipment used in the California oil test extraction methods?

[fol. 184] A. Yes, I think so.

Q. In January of 1958 did you visit the packing house of South Florida Growers Association, Incorporated?

A. Yes, I did.

Q. Is this latter organization a Plaintiff in this case?

A. As I understand it, yes.

Q. At that time where was this packing house located?

A. It seems to me it was close to Miami, near Homestead.

Q. Is there a laboratory in that house, in that building?

A. Yes, there was.

Q. Would you describe briefly the equipment you saw there?

A. I saw a sink and working bench; close to that I saw a mechanical arrangment for taking the juice out of limes. I saw other glassware used for measuring the cubical amount of juice that was extracted from the limes. That is about the extent of it.

Q. What equipment would be required there in addition to the equipment you observed for them to make oil tests on avocados as we do it in California?

A. That would require a shaker, it would require quite a lot of glass equipment and testing materials. I don't think I can give all of them. Essentially it would also require a refractometer.

Q. What would be the cost of this additional equipment?

A. If they use the type of shaker that we use in our [fol. 185] Sacramento chemistry laboratory I would estimate the cost at about $600.

Q. Is the training of the person to make these tests difficult or fairly easy?

A. Well, I should like to answer that this way: We train

our regular inspectors in this method, and they do it successfully.

Q. Does it take a trained graduate chemist to make these tests?

A. No, it does not.

Mr. Fourt: You may cross examine.

Cross examination.

By Mr. Ferguson:

Q. Mr. Whipple, when you were in South Florida did you also visit the sub-tropical experiment station at Homestead, Florida?

A. Well, I am not sure that I recall it as that name, but we did visit with Mr. Stahl there.

Q. Mr. Stahl. How about Mr. Harkness?

Mr. Fourt: If the Court please, this is beyond the scope of the direct examination.

Judge Goodman: Well, we don't think there is very much point in the testimony anyhow.

Mr. Ferguson: I have one more question.

Judge Halbert: All right.

[fol. 186] Mr. Ferguson:

Q. I am talking about the station where Mr. Harkness is.

A. I can't recall. I do recall meeting Dr. Harkness, yes, but I am not sure where it was. You asked me where it was.

Q. Did you examine the equipment at that station?

A. Well, I recall seeing a shaker there, if that is what you mean, yes.

Q. Is that all you saw?

A. I believe he had a refractometer.

Q. He had complete equipment for making oil tests?

A. I assume so.

Mr. Ferguson: That is all.

Mr. Fourt: No further questions.

Judge Goodman: That is all.

Mr. Fourt: If the Court please, this completes the Defendants' case in chief.

Mr. Ferguson: The Plaintiffs rest again with that understanding that we have about the deposition testimony.

I would like to say a word about the Plaintiff's motion for substitution of the new Director.

Judge Goodman: We will submit that, Counsel.

Mr. Ferguson: Yes, but in view of the position taken by Counsel for the Defendants I would like to now, I thought it would be unnecessary, present a more formal [fol. 187] motion. I would like leave of Court to file such motion within a short time.

Judge Goodman: I think I could speak for my colleagues in saying that we do not attach much importance to that matter, because the testimony of one of the witnesses for the defendant was to the effect that fruit from Florida did come into California, and was rejected by the authorities for lack of oil content. So I don't think it makes very much difference.

Mr. Ferguson: I think the Director should be a defendant. The reason I filed what might be a summary motion was that exactly the same thing happened when Mr. Warne succeeded Mr. Jacobsen, and the Court ruled upon it, and I was making my motion on the same grounds.

Judge Goodman: I think you needn't concern yourself about that, because I think my colleagues and I are agreed that while it is not too clear, which as some time mandates are not, that we are going to follow what the Supreme Court said and decide this case on the merits.

Mr. Ferguson: Well, I would like to have this defendant substituted.

Judge Halbert: I gather that the point that you are now concerned with, Mr. Ferguson, is that there has now been another change in the Director of Agriculture.

Mr. Ferguson: Yes, and I learned about him Friday.

Judge Halbert: As far as I am concerned, unless Judge [fol. 188] Goodman and Judge Bone disagree with me, you can file your motion, and we will consider it as though it were a part of the original motion.

Mr. Ferguson: Within a very short period, whatever your Honor suggests.

Judge Halbert: I think we ought to get to the question of the memos we are going to have filed in this matter.

Judge Goodman: Why don't you file it along with your memorandum? If you wish to put it in formal shape, file it along with your memorandum.

Now before we get to that, there has been testimony of witnesses. Is that testimony of the witnesses going to be written up by either side? The Court feels it should be written up, because this is a case that will require findings, and therefore there ought to be a record to which reference can be made.

Mr. Fourt: If the Court please, a transcript of the testimony of Dr. Harding is now available.

Judge Goodman: We are talking about all the witnesses.

Mr. Fourt: Yes. We have ordered a transcript of Dr. Harding's testimony and no one else's.

Mr. Ferguson: I think we should order the rest then, if the Court feels—

Judge Halbert: I would like to suggest for myself, I think that all of the testimony—I don't care about all these [fol. 189] collateral arguments here, but all of the testimony and all of the stipulations and all of the references to evidence should be written up and transcribed by the reporter, but no documents nor no printed material be included in that record. It can be referred to as an exhibit.

Mr. Fourt: Excellent.

Judge Halbert: Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter.

Mr. Fourt: No, your Honor. We have reserved our right to object to each sentence as it is read into the record.

Judge Halbert: I understand that, and furthermore there is no sense in copying this book here again into the record. The Reporter would like it, I am sure, but I don't think the Court wants to read through it, and I don't think counsel would want to pay for it.

Mr. Ferguson: We don't want to make the State of Cali-

fornia pay for it again and raise this two billion dollar budget.

Mr. Fourt: The matter of the depositions we understand is not now in evidence.

Judge Halbert: It is offered subject to your objections.

Judge Goodman: Subject to your objections, which you [fol. 190] can present in your brief.

Mr. Fourt: We would have testimony, then, your Honor, to produce if any of the matters in the depositions are to be admitted into the record, and any of those documents. We feel it is a material prejudice here, and we ask that the depositions be read, and we be allowed to enter our objections.

Judge Goodman: You mean now?

Mr. Fourt: Yes, now.

Judge Halbert: I don't get your point at all.

Judge Goodman: We may decide this case—I am not going to disclose the secret workings of our minds, but we may dispose of this case without any need of acting upon objections to the depositions. We are not going to consider that unless it is necessary. If it is necessary then we will have to have another hearing.

Mr. Fourt: If the Court please, just allow us to raise our objections at this time.

Judge Halbert: You have got that already. We have told you that your objections stand to every word that is in these depositions here, and that if it becomes necessary for us to have another hearing I think we ought to, but I don't think there would be any useful purpose served by our sitting here hour after hour while these things are read to us, and you object to each word and phrase in the matter. [fol. 191] As Judge Goodman has suggested, if we approach that and it becomes necessary we will have another hearing, but I don't want to do it now.

Judge Goodman: For example—I am not authorized to speak for my colleagues, but suppose we were to decide that the regulations of California, to use Counsel's words, not inherently discriminatory, we don't have to rule on depositions.

Mr. Fourt: Yes, you are right.

Judge Goodman: We first have to determine what the

Supreme Court has asked us to determine, which is the merits of this matter. And if it becomes necessary to consider the depositions and the objections we will have to consider them at a later time.

Mr. Fourt: Do I understand, sir, that the depositions are not now in evidence and that if the Court desires to read them there will be another hearing?

Judge Goodman: They are all in evidence subject to your objections and the Court will rule on them when it makes its ruling in the case if it is necessary.

Mr. Fourt: Thank you, your Honor.

Judge Bone: Mr. Fourt, I have one little question of my own, it may or may not have the slightest importance: I think Mr. Wiggs testified about a sort of staging operation at Escondido.

[fol. 192] Mr. Fourt: Yes.

Mr. Bone: And Mr. Whipple testified about the method used by the State, and I believe Mr. Wiggs referred to the fact that some State officials of the Agricultural Department appeared down there.

Mr. Fourt: Yes, that is right.

Judge Bone: Do they make an inquiry into the condition of the avocados at that point?

Mr. Fourt: Yes, in the plant, that is correct.

Judge Bone: That is what I mean.

Judge Halbert: They are stationed there, are they not?

Mr. Fourt: Yes, that is correct.

Judge Bone: Well, I just wanted to clear that up in my own mind.

Judge Goodman: How do you want to file your memorandums, gentlemen?

(Discussion between Court and Counsel.)

(It was ordered that the Plaintiffs have 30 days to file an opening memorandum, the Defendants 30 days to file their memorandum, and the Plaintiffs 15 days to file closing memorandum. Also that the Plaintiffs would have 30 days to file an Amended Motion for substitution of Defendant.)

[fol. 193] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil Action No. 7648

[Title omitted]

AMENDED MOTION AND SUPPLEMENTAL COMPLAINT FOR SUBSTITUTION OF PARTY DEFENDANT—Filed March 9, 1961

The plaintiffs, Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., by Isaac E. Ferguson, their attorney, pray for leave of court to substitute Charles Paul, Director of the Department of Agriculture of California, as party defendant in place of William E. Warne, and as cause for said substitution allege as follows:

1. In plaintiffs' complaint, filed November 13, 1957, W. C. Jacobsen, then Director of Agriculture of California, was named as one of the defendants and thereafter participated in the proceedings herein as defendant until June 6, 1960, when the court granted leave to plaintiffs to substitute William E. Warne, then Director of the Department of Agriculture, as defendant in lieu of W. C. Jacobsen.

2. Said William E. Warne resigned as Director of Agriculture and on January 3, 1961, pursuant to appointment by the Governor of California, James T. Ralph took office as his successor. Subsequently said James T. Ralph resigned as director and on February 1, 1961, pursuant to appointment by the Governor of California, succeeded to [fol. 194] said office and is still performing the duties thereof.

3. Ever since the enactment of section 792 of the Agricultural Code of California in 1925, of the enforcement of which the plaintiffs complain, said statute has been continuously enforced by the officers of the state against all persons, including the plaintiffs, who have heretofore offered avocados for sale in this state, in particular avocados

grown in Florida and shipped to California for sale in this state. The Director of the Department of Agriculture is the officer of the state primarily charged with the duty and authority to enforce all provisions of the Agricultural Code, in particular section 792 of the Code, and plaintiffs allege that said statute will continue to be enforced against them by the present director, Charles Paul, in the manner alleged in the complaint, unless deterred by judgment of this court.

4. There is substantial need for continuing this action against said Charles Paul and the other defendants named in plaintiffs' claim as amended, in order to obtain final adjudication of the issues involved, in compliance with the decision in this case rendered by the Supreme Court of the United States on March 7, 1960, and such further proceedings in the case are now in progress.

Wherefore plaintiffs again pray for leave to amend their complaint by substituting said Charles Paul as defendant in place of William E. Warne, all proceedings in the case to stand as if said Charles Paul had originally been named as defendant, and all pleadings, motions and objections heretofore made by the defendants W. C. Jacobsen and William E. Warne to be given effect as if made by said Charles Paul.

March 8, 1961.

Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., plaintiffs, by Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 195]

Points and Authorities

I.

The substitution of the present Director of the Department of Agriculture as defendant in place of his predecessor in said office is authorized both by federal and state law.

Allen v. *Regents of University System of Georgia*, 304 U.S. 439, 444-445, 58 S. Ct. 980, 982-983.
Estate of Lermond, in 2 Cal. 585.
Weadon v. *Shalen*, 50 C.A. 2d 254, 259-260.

II.

The complaint relates to the further enforcement of section 792 of California's Agricultural Code, in the manner indicated by past enforcement thereof, and such enforcement has been carried on as a continuing duty of the office by all persons who have served as Director of the Department of Agriculture during the past thirty-five years, therefore it is to be presumed that like enforcement of the challenged statute will be continued by the present director, unless he avows a contrary intention, until the statute is repealed or further enforcement thereof in the manner of which plaintiffs complain is prevented by order of this court.

The ruling made by the court on plaintiffs' motion for leave to substitute William E. Warne as defendant in place of W. C. Jacobsen is in all respects applicable to the present motion.

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 196] Certificate of service (omitted in printing).

[fol. 197] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER CORRECTING CLERICAL ERROR—Filed March 13, 1961

Pursuant to noticed motion of the defendants herein and for good cause shown, the Clerk of this Court is directed to correct his records nunc pro tunc as of February 8, 1961, to show that Defendants' Exhibits A, B, C and D were admitted into evidence and are in evidence in this case.

Dated: March 13, 1961.

Sherrill Halbert, United States District Judge.

[fol. 198] Stipulation Re Exhibits—Filed April 26, 1961.

Omitted. Printed side folio 585, page 555, supra.

[fol. 200] Stipulation Re Plaintiff Corporations—Filed April 26, 1961.

Omitted. Printed side folio 584, page 554, supra.

[fol. 201] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

SPECIAL APPEARANCE IN OPPOSITION TO PLAINTIFFS' MOTION TO SUBSTITUTE PAUL FOR WARNE—Filed April 26, 1961

Comes now petitioner Charles Paul, Director of Agriculture, State of California, and appears in the above-entitled action *specially only*, and for the sole purpose of opposing plaintiffs' motion to substitute him for William E. Warne as a defendant in this action.

Plaintiffs' motion to substitute the successor Director of Agriculture comes under Rule 25(d), Federal Rules of Civil Procedure:

"(d) *Public Officers; Death or Separation from Office.* When an officer of . . . a state . . . is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Sub-
[fol. 202] stitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens

to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."

The justification for substitution is the bold statement made in the body of the motion that "plaintiffs allege that said statute [Sec. 792, Agr. Code] will continue to be enforced against them by the present director, Charles Paul, in the manner alleged in the complaint, unless deterred by judgment of this court." (Plaintiffs' Motion to Substitute, p. 2). This language is virtually verbatim from Rule 25(d). No facts are alleged justifying this legal conclusion. In the absence of the requisite showing, plaintiffs' action in substance becomes one against the State and is barred by the Eleventh Amendment. "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State." The latter procedure would be convenient " . . . but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Fitts* v. *McGhee*, 172 US 516, 529.

Plaintiffs cite *Allen* v. *Regents of University System of Georgia*, 304 US 439, 444-445 in their moving papers. However, the person substituted in Allen was a federal officer. By virtue of this statute, Congress has authority [fol. 203] to direct the conduct of federal officers in proceedings brought against them. Ex parte Le Prade, 289 US 444, 458. " . . . Congress is not so empowered as to state officers." Id. at 458.

With respect to federal officers, the only question is whether there is a substantial need for continuing the litigation. Rule 25(d), Federal Rules of Civil Procedure. In the case of a state officer, it must be further established that plaintiff has a quarrel with the official and not the statute book. Ex parte Young, 209 US 123, 159-160. If the

quarrel is only with the statute book, the action is one against the State and is barred by the Eleventh Amendment. *Fitts* v. *McGhee*, 172 US 516, 529. In addition, the requirement that the quarrel be with the official assures that positions have been taken which make the controversy concrete. Compare *Public Service Commission* v. *Wycoff Co.*, 344 US 237.

It follows that plaintiffs have not made the showing required by Rule 25(d), and plaintiffs' motion to substitute should be denied. If plaintiffs' motion is denied, the then remaining defendants would be Edmund G. Brown as Governor and Stanley Mosk, as Attorney General. It is noted that they were joined as defendants over their objection by Court Order filed June 13, 1960. Plaintiffs' motion to substitute had been filed April 29, 1960. Both the filing of the motion, and the granting of the order by substitution occurred more than six months after January 5, 1959, the date when they took office, and therefore beyond the time limitation prescribed in Rule 25(d). No enlargement of this time can be granted by the Court Rule 6(b). The Supreme Court has held that the six months time limit for substituting a new official is jurisdictional. *Snyder* v. *Buck*, 340 U.S. 15, 19; United States ex rel. *Claussen* v. [fol. 204] *Curran*, 276 U.S. 590, 591.

Dated:

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, By John Fourt, Attorneys for Defendants, William Norris, Of Counsel.

[fol. 205] Affidavit of Service by Mail (omitted in printing).

[fol. 206] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Plaintiffs,

vs.

WILLIAM E. WARNE, et al., Defendants.

Defendants' Reply Brief—Filed April 26, 1961

[fol. 207] Clerk's Note

Citations are to the transcript of testimony at the trial February 7 and 8, 1961, denoted "Tr." and to the transcript of the depositions taken by plaintiffs in Miami, Florida, January 21 and 22, 1958, denoted "Dep. Tr."

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[fol. 210] Plaintiffs' Contentions

1. Section 792, California Agricultural Code, as invalid under the Federal Constitution as imposing an unreasonable burden on interstate commerce and because it denies to plaintiffs equal protection of the laws under the Federal Constitution.

2. The Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246, as supplemented by a marketing regulation pertains to avocados grown in South Florida, 7 C.F.R., Pt. 969, pre-empts state authority and thereby invalidates Section 792, California Agricultural Code.

[fol. 211] Defendants' Contentions

1. Section 792, California Agricultural Code, constitutes a valid exercise of the state police power and is not in conflict with either the Commerce or Equal Protection Clauses of the Federal Constitution.

2. Neither the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246, nor the marketing regulation pertaining to avocados marketed in South Florida, 7 C.F.R., Pt. 969, pre-empts state authority and does not conflict with Section 792, California Agricultural Code.

[fol. 212] Summary of Argument

In 1925 the California Legislature enacted an avocado maturity statute, adopting as the test of maturity the requirement that avocados have no less than 8% oil content. California Statutes of 1925, Chapter 350, pages 625, 633. The purpose of the statute is to prevent the sale of immature fruit to consumers and retail merchants since the maturity of the avocado cannot be gauged from physical appearance. This standard of avocado maturity stood without judicial challenge for 32 years before plaintiffs filed the present action.

Plaintiffs ask that the court declare this 1925 State enactment invalid under the Commerce and Equal Protection Clauses of the Federal Constitution and in conflict with the Agricultural Marketing Act of 1937, 49 Stat. 750, as

amended 50 Stat. 246. Further, plaintiffs ask the court to enjoin state officers from enforcing the statute.

On these constitutional issues plaintiffs have the burden of proof. "It is a salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, ..." *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584.

The record in this case shows that plaintiffs have failed to carry their burden of proof. They ask the court to strike down a state statute but have failed to produce substantial reliable evidence to support their constitutional claims. At most, the record shows that some of the West Indian varieties of avocados grown in Florida reach maturity with less than 8% oil content. But the record also shows that the West Indian varieties represent only 12% of Florida avocado production and are declining in commercial importance. Moreover, the question of the effect of [fol. 213] California's avocado maturity statute on the West Indian varieties is hypothetical because, as the record shows without contradiction, these varieties are so highly perishable that it is not commercially feasible to ship them from Florida markets to California.

The principal commercial varieties grown in Florida are hybrids, which constitute 88% of the production. Notable among the hybrids are the Lula, Booth 7 and Booth 8 varieties. The record shows that these varieties exceed 8% in oil content when mature. The California avocado maturity law is not a barrier to the marketing of Florida's hybrid varieties if they are left on the tree a sufficient length of time before picking. Indeed, some 98% of the avocados shipped by plaintiffs to California have complied with the 8% oil standard and have been freely marketed here.

Defendants urge that plaintiffs' motive in attacking the California statute is that they are anxious to pick their hybrid varieties early, before they attain 8% oil content, and rush them to the California markets when California avocado production is light and the market price is high.

On the issue of pre-emption by the Agricultural Marketing Agreement Act of 1937, and the marketing regulations governing Florida avocados issued thereunder, defendants contend that there is no conflict in either legislative pur-

pose or in federal administration between the federal regulation and state enactments.

Finally, defendants contend that the economic injury, if any, suffered by plaintiffs from the avocado maturity statute is so slight as to be almost *de minimis*. The record shows that 98% of all avocados shipped by plaintiffs to California have complied with the 8% oil standard and have [fol. 214] been marketed without interference. In the past two seasons plaintiffs appear to have abandoned all business operations in California. Plaintiffs have not met the strict test of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its discretionary powers of equity to interfere with the enforcement of state laws. E.g., *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95.

[fol. 215] Summary of Evidence

1. Cardinal Facts

Defendants contend that the cardinal facts that emerge from the evidence in this case are:

1. "Maturity" under both Federal and California law means that the fruit has reached that stage of ripeness which will insure the completion of the ripening process after removal of the fruit from the tree. 7 C.F.R. 51.3058; Calif. Agr. C., Sec. 781(h).

2. Oil content in the avocado increases during the maturation of the fruit on the tree and is a reliable index of maturity. Tr. 44; 65; 108; 136.

3. Avocados which are picked when immature do not ripen into edible fruit but shrivel into an unsatisfactory condition. Tr. 60-61; 137; 162.

4. The state of maturity of an avocado cannot reliably be ascertained by observation. Tr. 61; 107.

5. 8% oil content is a reliable index of avocado maturity. Tr. 137; 164.

6. Avocados grown in Florida fall into two classifications: (a) the early or West Indian varieties, and (b) the late or hybrid varieties. Tr. 47. The West Indian varieties

of commercial importance constitute 12.17% of the Florida crop; the remaining hybrid varieties constitute 87.83% of the crop. Shipments, 1959-1960 season, defendants' exhibit E in evidence.[1] These West Indian varieties are [fol. 216] lessening in volume, having dropped from 20.2% of the total in the 1955-1956 season to 12.17% as in the 1959-1960 season. Defendants' exhibit E in evidence.

7. The West Indian varieties do not, generally, attain 8% oil content at maturity. Tr. 45. The hybrid varieties attain a maximum of 15 to 20% at maturity. Tr. 46.

8. The West Indian varieties have such poor shipping qualities and short retail store "shelf-life" that it would not be commercially feasible to market them across the continent in California, even in the absence of the 8% oil content statute. Tr. 164-165; 177-179.

9. The most attractive period for shipping to California avocados are the months of September, October and November when California production is at its lowest and market prices are the highest. Tr. 162; Dep. Tr. 230-231.

10. Plaintiffs have successfully marketed over 98% of all avocados which they have shipped to California from Florida. Plaintiffs' exhibits 17, 19, 20, 21 and 8. Those few avocados found to contain less than 8% oil content were shipments made early in the marketing seasons. Plaintiffs' exhibits 17 and 21 for identification. All shipments made in the months of December and January passed the 8% oil test and were freely marketed in California, with [fol. 217] only one exception, a shipment on December 8,

[1] The varieties Fuchs, Pollock, Simmonds, Hardee, Nader, Trapp, Waldin, Peterson, Pinelli, Tonnage and Fairchild were identified as West Indian varieties. Dep. Tr. 154, 164, referring to plaintiffs' exhibit 9 for identification. Because of lessening commercial importance of the varieties Pollock and Pinelli which were listed in the 1955-1956 season were not named in the 1959-1960 tabulation but were included in the 26 varieties and seedlings constituting 4.27% of total volume in the 1959-1960 season. Defendants' exhibit E in evidence. In calculating the percentage figure for the West Indian varieties, it was assumed that these 26 unlisted varieties and the seedling varieties would distribute the same as did the named varieties.

1955. Dep. Tr. 229-230; plaintiffs' exhibits 17, 21 for identification.

[fol. 218] Testimony of Paul L. Harding

Plaintiffs' only witness at the trial was Paul L. Harding, Supervisory Plant Physiologist, United States Horticultural Field Station, Orlando, Florida.

The material portions of his testimony are:

1. *Concept of maturity.* In the horticultural sense, the fruit is mature if after picking it will soften and become palatable; a fruit that is picked before maturity will not soften properly but will shrivel. Tr. 53-54.

2. *Oil as a measure of maturity.* Harding testified, in response to a question from Judge Halbert, that oil could be used as a yardstick of avocado maturity, although he felt that there should be different oil standards for different varieties. Tr. 65. Harding thereby conceded a basic point, i.e., that oil can be used as a measure of avocado maturity. His earlier testimony was, however, contradictory. He testified that oil content was not directly related to palatability and that palatability embraced maturity. Tr. 43. On cross-examination, Harding seemed to contradict himself further when he testified that he disagreed with the following published statement by A. L. Stahl:

> "The fact content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit." Tr. 76.

Harding acknowledged that Stahl was an authority on Florida avocados and that he had read Stahl's publication, "Avocado Production in Florida," published in 1942. Tr. 70.

3. *Oil content of varieties of avocados grown in Florida.* Harding's testimony is less than clear and precise on the specifics of varieties of avocados grown in Florida commercially. He testified that the oil content of varieties [fol. 219] grown in Florida ranges from 3 to 20% at maturity. Tr. 48-49. The West Indian varieties are low on oil content. Tr. 45. Other varieties, hybrid and Guatemalan,

have the higher oil content. Tr. 48-49. They are marketable and palatable at 15 to 20%. Tr. 46.

4. While Harding was not qualified as an avocado marketing expert, he testified that 69% of the Florida avocado production would reach 8% oil content if left on the tree a sufficient length of time. Tr. 91. This delay in picking simply affects the time when the growers get their money. Tr. 92.

5. *Shipping qualities and shelf life of West Indian varieties grown in Florida.* Harding testified that the low oil content West Indian varieties soften more quickly after picking than the high oil content hybrid varieties. Tr. 71-72. The shelf life (the period in which the fruit is held at the retail level) is shorter for the West Indian varieties, and therefore the fruit must be moved to market faster and more precaution taken to avoid spoilage. Tr. 72.

Harding's testimony may be summed up as follows: Avocado maturity can be measured by oil content. West Indian varieties seldom reach 8% oil content; hybrid varieties do reach 8% oil if left on the trees a sufficient length of time. West Indian varieties soften faster and therefore must be marketed more quickly than hybrid varieties.

One final comment on Harding as a witness. His testimony on the oil content of Florida avocados is of questionable reliability and entitled to little, if any, weight. His testimony was not based upon oil tests made at the U.S. Horticultural Field Station at Orlando where he is supervisory plant physiologist. Tr. 2. Rather, the oil tests were [fol. 220] made at the University of Florida Sub-tropical Experiment Station at Homestead, Florida, Tr. 8-10, which is not even an agency of the United States Government or its Department of Agriculture. In his testimony and opinions Harding relied on the research done by a Roy W. Harkness at the Sub-tropical Experiment Station. Tr. 96-97. Defendants submit that Harkness rather than Harding should have been plaintiffs' principal witness on oil content in Florida avocados. Rather than produce Harkness as a witness before the court, plaintiffs have offered his testimony in deposition form. Dep. Tr. 92; 156. Defendants will hereafter set forth the basis for their objections to the admissibility of the Harkness deposition. Further, de-

fendants will make an offer of proof that the University of Florida Sub-tropical Experiment Station used faulty methods of oil testing that makes the results of its tests unreliable as evidence.

[fol. 221]

Defendants' Objections to Plaintiffs' Offer to Introduce Depositions and Exhibits in Evidence

I. Defendants Have Reserved Objection to Plaintiffs' Evidence.

At the trial February 7, 1961, plaintiffs offered in evidence (without reading) the 305-page transcript of the depositions of plaintiffs' witnesses David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty, and R. M. Winbush. Tr. 29. Rule 26 (f), Federal Rules of Civil Procedure. Also offered in evidence were the exhibits attached to the depositions. Tr. 29. Defendants immediately objected and asked that the depositions be read in order that objection could be made statement by statement and witness by witness. Tr. 29. Defendants renewed their objection at the completion of the trial. Tr. 189. All of defendants' objections were reserved pending the filing of briefs. Tr. 29, 189-190.

Plaintiffs also offered in evidence plaintiffs' exhibits 23 to 26 for identification. Tr. 30, 37, 40, 69. The court, on its own motion, sustained an objection to Exhibit 23 for identification on the ground of relevancy and reserved ruling on the admissibility of Exhibits 24, 25 and 26 for identification. Tr. 31, 32, 69.

The transcript of the trial shows that plaintiffs' exhibits 1 to 23 were marked for identification only. Tr. i; 29.

Plaintiffs argue that the transcript of deposition and plaintiffs' exhibits 1 to 23 for identification became "parts of the record of the case" because defendants referred to the transcript and exhibits in their motion to dismiss. Plfs.' Br. 45. However, there was no evidence taken nor witnesses sworn at the time of oral argument on the motion, nor did either party offer such proof. In moving to dismiss, [fol. 222] defendants urged that the bill of complaint, viewed in light of the depositions of plaintiffs' own witnesses on the extent of their economic injury, failed to show a case within the equity jurisdiction of the court. Compare *Spiel-*

man Motor Co. v. *Dodge*, 295 U.S. 89, 91. Defendants thus accepted the allegations of the complaint and portions of the depositions for the limited purpose of the motion to dismiss only. By filing the motion, defendants did not agree to open the floodgates, at the trial on the merits, to the admission into evidence of all the depositions taken by plaintiff, or any portion of them. Plaintiffs' substantive case, as contrasted to the sufficiency of their pleadings, was first presented to the court at the trial, February 7 and 8, 1961.

No authority has been cited by plaintiffs, nor can authority be found, to support the proposition that a litigant waives the benefits of the rules of evidence by filing a motion to dismiss.

The stipulation of the parties, through their counsel of record, dated January 9, 1958, for the taking of depositions provided:

> "... that said depositions when taken may be read and used in evidence in said cause by either party on any trial thereof or proceeding therein *subject to the same objections and exceptions as if the said witnesses were personally present on the stand*, . . . " (Emphasis added).

Stipulation dated January 9, 1958, attached to Transcript of Deposition, filed herein March 14, 1958. Defendants reserved this right of objection by raising appropriate objection at the trial to the admission of the depositions in evidence without reading. Tr. 29, 31-32, 69, 189.

[fol. 223] Similarly, defendants have never waived provisions of Rule 26 (e), Federal Rules of Civil Procedure, which provides that " . . . objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence of the witness were then present and testifying." Compare Rule 33(c)(1), Federal Rules of Civil Procedure.

Thus, if defendants' objections are well taken, the plaintiffs' depositions and exhibits should not be received in evidence. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.* (9 Cir.), 264 F.2d 199. In this case counsel for

plaintiffs moved at the trial "that the deposition of Charles W. Cannon . . . shall be considered in evidence on behalf of the [Plaintiff Securities and Exchange] Commission." Over objection of defendants the depositions were received in evidence. On appeal, the judgment was reversed, the Court of Appeals for the Ninth Circuit stating that "defendants were entitled to make their objections to many of the questions asked on this deposition, and to have the court in an intelligent and orderly manner. This right was taken from defendants by the court's ruling." 264 F.2d 199, 213.

Plaintiffs argue that in a case heard without a jury "there could be little profit in discussing admissibility of evidence rather than its probative force." Plfs.' Br. 47. Conceding that the court presumably would reject inadmissible or nonrelevant evidence in reaching its decision, this presumption does not convert inadmissible evidence into admissible evidence under the Federal Rules of Civil Procedure.

[fol. 224]

II. The Deposition of Roy Harkness and Plaintiffs' Exhibit 16 for Identification Should Be Excluded From Evidence.

Plaintiffs' Exhibit 16 for identification consists of numerous photostats setting forth avocado oil test determinations made at the University of Florida Sub-Tropical Experiment Station, at Homestead, Florida. Dep. Tr. 93-100. Tests were made by a Mrs. McKee and a Mrs. Kelp. Dep. Tr. 123. The witness Harkness was present during only a few of these tests. Dep. Tr. 123. Defendants object to the introduction of this exhibit into evidence on the grounds (1) that there has been no foundation laid showing the accuracy of the oil testing method used, (2) that the exhibit is irrelevant to the issues in this case since no foundation is laid showing that the avocados tested were mature edible avocados, and (3) that the exhibit contains inadmissible hearsay.

Plaintiffs' witness Roy W. Harkness testified that a series of oil content analyses were made on Florida avocados at plaintiffs' request. Dep. Tr. 94-95; 108. These analyses were made out of court and without notice to defendants. This class of experimental evidence therefore should be received with caution since its use allows a party to manu-

facture evidence in its own behalf. The objection here raised is to admissibility. "Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful." *Hesler* v. *State*, 52 Fla. 30, 42 [fol. 225] So. 692, 695. Similarly in *McLendon* v. *State*, 90 Fla. 272, 105 So. 406, 408, the court stated: "Evidence of this kind is not favored by the courts, and should be received with caution. It may be properly admitted only when the accuracy, precision, and similarity of conditions and circumstances, so essential in such matters, have been preserved."

Plaintiffs' Exhibit 16 for identification consists of oil tests made on Florida orchard-run avocados from July 6, 1953, through January 16, 1957. See testing dates, Plfs'. Ex. 16 for ident.; Dep. Tr. 113. On direct examination, Mr. Harkness testified:

> "Q. What method did you use to test the oil content?
>
> "A. We used exactly the method used in California, with the hallowax oil and the shaker bomb.
>
> "Q. What equipment did you use?
>
> "A. We used the shaker bomb, and we used the refractometer for getting the refractive index, and also miscellaneous laboratory equipment." Dep. Tr. 95-96.

However, on cross-examination, Mr. Harkness admitted that a method *other* than the prescribed California oil test had been used:

> "Q. Doctor, in your oil tests, which appear to have been made from 1953 to date, what type of oil tests did you utilize?
>
> "A. It was essentially the method used in California. *We modified the method slightly, so as to avoid using the shaker machine which they use.* (Emphasis added.)
>
> * * *
>
> [fol. 226] "Q. Doctor, in making these tests will you describe for me the various steps that you utilize from

the time the fruit enters your laboratory until you finally make your final rating?

"A. . . . .

"Q. . . . .

"A. We weigh out a five-gram sample of the fruit. We obtain that sample by means of a core bar. . . . We put that in a jar, a Waring blendor, and add five millimeters of hallowax oil and two hundred millimeters of water. . . . " Dep. Tr. 146.

* * *

"Q. Would you describe this Waring blendor?

"A. It is an ordinary household mixer, along with a quart jar on a little motor placed on a stand.

"Q. Is the Waring blendor a standard brand?

"A. Yes." Dep. Tr. 147.

The ball-grinder oil test used in California has been standardized against the ether extraction method and its validity thus assured.[2] See Bulletin Calif. Dept. of Agriculture, Vol. XLIV, No. 1, p. 1, and 3 Calif. Adm. Code 1397.5, lodged with the court, and attached as Exhibits A and B hereto. Tr. 130. No such showing has been made regarding the Waring blendor technique used at the experiment station.

The qualification of a witness in a federal district court to testify as an expert is tested by the law wherein the action is brought. *Diesbourg* v. *Hazel-Atlas Glass Co.* (3 Cir.), [fol. 227] 176 F.2d 410, 413.[2] Under California law, a foundation must be laid prior to the admission of this type of expert evidence by the asking of questions which disclose the source and reliability of the knowledge of the witness. See *Long* v. *Cal-Western States Life Ins. Co.*, 43 Cal.2d 871, 882, experiments of ballistics expert excluded as speculative; compare *People* v. *Ely*, 203 Cal. 628, 633; *People* v. *Roberts*, 40 Cal.2d 483, 490. There is no presumption that a witness is an expert or that his experiments are valid and it is incumbent upon the party offering the witness to show that he possesses the necessary skill and that

[2] Plaintiffs do not challenge the official oil testing method used by California enforcement officers. Tr. 110.

his testimony is probative. *Tully* v. *Mahoning Express Co., Inc.*, 161 Ohio St. 487, 119 N.E.2d 831, 833.

The reliability of these oil tests is not established by plaintiffs. In the absence of a showing that the Waring blendor test method used at the experiment station is as effective as the ball-grinder method in extracting all of the oil from the tested avocados, the tests cannot be of probative value. No such showing has been made by plaintiffs. For all that their evidence shows, the Waring blendor method may be totally unreliable and may extract only a portion of oil from the avocados tested.

Plaintiffs' memorandum prior to trial, page four, has represented that " . . . only avocados that have attained specified weight (or size measured by diameter) may be picked;" under the federal marketing regulations. Plaintiffs fail to show that any single avocado tested at the experiment station would have met these standards. Most tests were made in years prior to the promulgation of the federal regulation in June of 1954 and are irrelevant. 7 C.F.R. Part 969. With respect to the avocados tested after June of 1954, only average weights are given. Neither the weights [fol. 228] nor the diameters of any individual fruit are given. Thus it is impossible to ascertain from the exhibit whether any given fruit would have met the federal diameter-size requirements. Similarly, there is no showing that the fruit met the federal "maturity" requirements. See definition of maturity for Florida avocados in 7 C.F.R. 51.3058:

> "Mature means that the avocado has reached a stage of growth which will insure a proper completion of the ripening process."

With respect to the fruit tested at the experiment station (i.e. fruit listed on page 28 of Exhibit 16), the witness Harkness was asked: " . . . whether any of that fruit was covered by a Federal-State Inspection Certificate?"

> "A. No, not when it was brought to us, that is, insofar as I know.
>
> "Q. Then so far as you know it had never been inspected?
>
> "A. That is right."

In many instances Harkness had no personal knowledge of the source of the fruit. Upon being asked if he had any personal knowledge of the fruit listed on page 78 of Exhibit 16, he stated:

> "Q. Then, is it true that as to the samples shown on that page, Dr. Harkness, that the only knowledge you would have would be knowledge given to you or your associates at the time of the delivery of the fruit to the laboratory?
>
> "A. Yes." Dep. Tr. 120.

It follows that the entries in Exhibit 16 showing date of picking and the owner of the orchard are inadmissible hearsay.

[fol. 229] In all events, the oil test results in question are irrelevant to any issue in this case. Commingled in the avocados tested were: (1) those picked in test orchards maintained at the experiment station, and (2) avocados usually picked in commercial orchards. Dep. Tr. 109-120. Since the fruit tested came from the orchard and not from the packing house, the fruit tested was not representative of the graded, sized and inspected fruit which plaintiffs might actually market. Low oil tests could easily be secured by simply supplying the experiment station with green (immature) fruit which plaintiffs had no intention of marketing. No showing is made as to the state of maturity of the fruit tested.

Plaintiffs' Exhibit 16 for identification should be excluded from evidence, (1) no foundation has been laid showing the accuracy of the oil test method used at the experiment station, (2) the contents of the exhibit are based on inadmissible hearsay, and (3) the tests are irrelevant since only green fruit may have been tested. Moreover, since the testimony of the witness is predicated upon these unverified oil tests, his deposition should likewise be excluded from evidence.

The Harkness deposition should be excluded for a further reason. Plaintiffs made no showing at the trial that the witness was a greater distance away than 100 miles. Rule 26 (d)(3), Federal Rules of Civil Procedure; compare *Mercado* v. *United States* (2 Cir.), 184 F.2d 24, 26-27.

[fol. 230]

III. If the Harkness Deposition and Exhibit 16 for Identification Are Received Into Evidence, Defendants' Offer to Prove That the Oil Testing Method Used by the University of Florida Sub-Tropical Experiment Station Is Invalid.

At the conclusion of the hearing held February 8, 1961, defendants renewed their objections to admitting the contents of plaintiffs' depositions into evidence without their being read. Tr. 190. Defendants represented that they would have refuting evidence to introduce "If any of the matters in the deposition are to be admitted into the record." Tr. 190. The court ruled that it would grant another hearing if made necessary by the consideration of the contents of plaintiffs' depositions. Tr. 190. Defendants herewith make their offer of proof in order that the court determine the necessity of holding another hearing.

Defendants offer to prove through chemists A. J. Bingham, J. B. LaClair, Frederick L. Delano, and Archie Shannon, that the oil testing method used at the University of Florida Sub-Tropical Experiment Station at Homestead, Florida, relied upon by the plaintiffs is invalid in two respects: (1) The test fails to recover all of the available oils in the avocado fruit tested and, (2) produces erratic test results.

Specifically, the defendants offer to prove: That two flats of avocados were purchased from the packing house owned and operated by the plaintiff South Florida Growers Association at Goulds, Florida; that these flats were purchased November 12, 1958, and December 4, 1958, and were thereafter shipped air express from Miami, Florida, to Sacramento, California. Upon arrival in California, [fol. 231] they were immediately tested for oil content. That each of the 32 hard fruit in the flats was cut in halves. One half was tested for oil content by qualified chemists at the Chemistry Laboratory, Department of Agriculture, State of California, using the testing method devised at the University of Florida Sub-Tropical Experiment Station. Dep. Tr. 146-147. This method will hereafter be called the "Waring blendor" method. The other half of each

of the 32 avocados was also tested for oil content using the oil test method prescribed by California regulations. 3 Calif. Admin. Code 1397.5; Bulletin, Calif. Dept. of Agriculture, Vol. XLIV, No. 1. This method will hereafter be designated the "ball-grinder" method.

The main difference between the two methods of oil extraction consists in the use of different equipment. The University of Florida Sub-Tropical Experiment Station used a Waring blendor, which utilizes sharp whirling blades. Dep. Tr. 146; Exhibit C attached hereto. When applied to the avocado fruit pulp, these rapidly whirling blades produce a shearing action. However, after partial maceration, the whirling blades fail to break all of the pulp cells containing oil because of the minute edge presented to the cells by the whirling blades.

The California test method uses a "ball-grinder" in which the avocado fruit pulp is placed in a steel cylinder which contains two steel balls. As the cylinder is powerfully jerked back and forth, the steel balls interact with each other and the cylinder walls crush the avocado pulp into a fine paste. This equipment is illustrated in Exhibit D hereto. Experiment has shown that the large area of contact between the cylinder and between the two balls, destroys the avocado pulp cell structure and renders available for measurement all of the oil in the avocado. The [fol. 232] test certificates, and a summary thereof, are annexed hereto as Exhibit E. These paired tests show that the Florida "Waring blendor" oil test method consistently fails to measure all of the oil in the avocado fruit tested. The average of the 32 tests shows a failure to remove 2.9 percent points of oil.[3] Exhibit F hereto.

Appendix II to plaintiffs' brief consists of a summary of plaintiffs' Exhibit 16 for identification, and shows the results of oil tests made at the University of Florida Sub-Tropical Experiment Station, Homestead, Florida. This summary would read as follows if the average error of 2.9 percentage points were considered:

[3] Evidence of chemical tests made by the two methods on California avocados will also be introduced.

[Vol. 233]

Variety	Period of Testing	No. of Tests	Oil Test	% Crop 1959-60. Defendants' Exhibit E in Evidence.
Pollock	1953:			
	July 6 to August 12	74	4.5– 6.2	—*
Waldin	1953:			
	July 27 to September 22	75	5.0– 9.0	9.15%
	1954:			
	July 20 to September 8	23	6.1– 7.9	
Booth 8	1953:			
	August 12 to September 30	53	5.6– 8.7	27.24%
	October 1 to October 30	24	7.3– 9.7	
	November 7 to November 25	28	7.6–11.3	
	1954:			
	December 3 and December 16	3	11.2–12.2, 11.7	
	August 16 to September 30	31	6.1– 9.1	
	October 5 to November 10	16	8.0–10.0	
Nia	1953:			
	August 12 to September 30	127	5.2–10.8	20.60%
	October 1 to October 30	91	7.8–13.9	
	November 2 to November 30	101	8.3–16.0	
	December 2 to January 13	88	7.4–16.0	
	1954:			
	August 24 to September 28	30	5.8– 8.6	
	October 4 to October 29	85	7.6–12.1	
	November 1 to November 30	44	8.6–12.5	
	December 6 to January 12	21	10.0–15.8	
Booth 7	1953:			
	September 9 to October 14	27	6.1– 9.8	12.95%
	October 16 to October 30	49	7.1–11.2	
	November 2 to November 23	60	7.0–14.0	
	December 1 to December 16	34	9.3–14.9	

* Production too low to be listed by name.

Variety	Period of Testing	No. of Tests	Oil Test	
	1954:			
	September 15 to October 12	10	6.7– 9.4	
	November 2 to November 30	22	7.0–12.7	
	December 6 to December 14	6	7.9–13.8	
Hickson	1953:			
	September 29 to October 30	10	8.7–10.3	4.36
	November 12 to December 4	6	9.8–12.9	
	1954:			
	September 22 to November 10	13	9.6–12.5	
Collinson	1954:			
	October 13	1	10.1	1.16
Booth 3	1953:			
	October 6 to November 12	10	6.9–11.2	2.51
	November 16 to December 31	8	9.6–13.4	
	1954:			
	November 10 to December 1	8	10.3–12.9	
[fol. 234]				
Taylor	1953:			
	October 22 to November 18	21	9.0–12.8	1.53
	November 24 to January 13	18	10.3–14.3	
	1954:			
	November 1 to December 14	16	10.0–13.1	
Booth 1	1953:			
	October 22 to December 16	9	10.4–13.8	3.32
	1954:			
	November 1 to December 14	11	10.9–14.6	
			Total percentage	83.34

[fol. 235] Thus, for example, the first avocado tested on Exhibit E shows a 7% oil content when analyzed by the Florida "Waring blendor" method. This same fruit when tested by the California "ball-grinder" method produced 11% oil content. Had plaintiffs received only the oil analysis made by the Florida "Waring blendor" method, they would conclude that the avocado fruit, which the sample represented, would fail to meet the California 8% oil requirement. In fact, however, the fruit would have met the California standard by a wide margin.

Even more serious are the erratic results produced by the Florida "Waring blendor" method of testing. The 32 fruit tested under the Florida method showed a variation from the ball-grinder results ranging from 9.9% to 41%. It is noted that plaintiffs' witness Harkness complained that avocados tested at the Florida Experiment Station, when picked from the same tree at the same time, were found to contain an unexplained range in oil content. Dep. Tr. 104. The explanation lies not only in the innate difference in the fruit, but also to the defects in the oil test method devised at the Homestead Experiment Station.

On cross-examination, plaintiffs' witness Harding was asked if he agreed with the findings of Dr. Arthur L. Stahl, Associate Horticulturist, University of Florida Experiment Station, Gainsville, Florida. Tr. 70-71. Stahl found that the oil content of Florida avocados during the period of commercial maturity were as follows (Tr. 70-71):

Florida Variety	Oil Content Range
Booth 7	10 to 14%
Booth 8	8 to 12%
Lula	12 to 15%

[fol. 236] Dr. Harding answered that the oil content tests he relied upon showed figures lower than those stated by Dr. Stahl. Tr. 71. The explanation, again, lies in the fact that Harding relied on the erroneous oil tests made at the University of Florida Sub-Tropical Experiment Station at Homestead, Florida. Tr. 10, 97. It may be inferred that Dr. Harding would agree with the figures given by Dr. Stahl if a valid method of oil testing had been used.

Plaintiffs have exaggerated this error in still another respect. Plaintiffs obtained the avocados for testing at the Sub-Tropical Experiment Station from the orchards and not from the packed, graded and sized fruit at the packing house. Dep. Tr. 112, 197-198, 268. By this error in fruit sampling plaintiffs increased the factor of error caused by the inaccurate oil tests obtained by plaintiffs.

Statistical inferences are inductive in that they ascribe certain characteristics to a large collection of objects from a knowledge of these same characteristics derived from only a few of the objects. The large collection of objects studied is called the universe. The few objects selected from the universe for study are called the samples. In the instant case, the universe would be the orchard from which the samples were taken. If the samples were truly random and were large enough, the characteristics of the samples could reasonably be attributed to the fruit in the orchard. However, the characteristics of the samples tested by the plaintiff cannot be attributed to the packed, graded, and sized fruit at the packing house since the latter universe was never sampled. For example, an oil test taken of a diseased "cull" avocado picked in the orchard would not be representative of the prime fruit which had passed through the [fol. 237] selective packing house procedures. Dep. Tr. 215-216. It is probable that such cull avocados would never have been hauled to the packing house, or if hauled they would have been graded out. Similarly, a small avocado from the orchard would not be representative of a box of larger graded and sized fruit, since the larger avocados probably would have had a longer growing period on the tree, and be more mature. Dep. Tr. 151.

To summarize, plaintiffs' attack on the California oil test statute stems from the erroneous results of an invalid oil test technique utilized in Florida, together with a faulty sampling procedure which caused plaintiffs to test fruit which were not representative of graded and packed fruit at the packing house.

[fol. 238]

IV. Further Objection to Plaintiffs' Evidence.

A. Plaintiffs' Exhibits 4, 5, 7, 8, 10 and 11 for Identification.

Defendants object to the introduction into evidence of plaintiffs' exhibits 4, 5, 7, 8, 10 and 11 for identification on the grounds that such exhibits constitute (1) inadmissible secondary evidence of the contents of other written documents not produced in court, (2) are not the best evidence of the contents of such other documents, (3) are inadmissible summaries, and (4) are inadmissible hearsay.

Plaintiffs' exhibits 4, 5, 7, 8, 10 and 11 for identification consist of summaries of Florida avocado shipments. These exhibits are based on copies of inspection certificates purportedly issued by the Agricultural Marketing Service, United Sta' Department of Agriculture, and the citrus and vegetable inspection division, Florida Department of Agriculture. Dep. Tr. 11, 36-37, 14-16, 17-20, 37, 26, 16-25, 28. Neither the original certificates nor authenticated copies were marked for identification at the time of the taking of the deposition, or otherwise made available to defendants and were never produced in court.

The witness Biggar testified that he had prepared the exhibits from copies of inspection certificates furnished to the Avocado Administrative Committee. Dep. Tr. 11, 14-16, 17-18, 25, 26, 37-38. Exhibit 4 for identification is "substantially" correct. Dep. Tr. 13-4. The witness stated that he had no personal knowledge regarding the preparation of the certificates. Dep. Tr. 36-37, 14-25, 26, 38. Information set forth in Plaintiffs' Exhibit 5 for identification came from a letter (not in evidence) from the federal [fol. 239] Department of Agriculture and from estimates supplied by Calavo Growers of California, a private marketing cooperative. Dep. Tr. 14-16; Tr. 175-176. The exhibits therefore constitute summaries of the contents of hearsay documents, and are not the best evidence.

In particular, the exhibits are not business records under 28 U.S.C. 1732. The purpose of this statute is to create an exception to the hearsay rule. Its basis was to facilitate admission of systematically entered records, which experience had shown to be trustworthy as routine reflec-

tions of day-to-day operations of business and to permit the introduction of these records without identifying, locating and calling as witnesses those who kept the records (*Palmer* v. *Hoffman*, 318 U.S. 109, 113-114). The statute does not cover records which are kept outside the regular course of business, or records kept by persons outside the business. Id. at 114.

The United States Supreme Court, in *Palmer* v. *Hoffman*, *supra*, at 114, after holding that the regular recording of events having nothing to do with the operation of the business would not qualify under the business records act, stated: "Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability [citation omitted] acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act [former 28 U.S.C. 695, now 28 U.S.C. 1732(a)] and their historic meaning. If the Act is to be regarded to apply not only to a 'regular course' of business but also to any 'regular course' of conduct which may have some relationship to the business, Congress, not this Court, must extend it. Such a major change which opens wide the door to avoidance of cross-[fol. 240] examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the very circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met."

The witness Biggar identified himself as Manager of the Avocado Administrative Committee, a body composed of Florida producers and handlers of avocados. Dep. Tr. 4; 7 C.F.R. 969.20. He further stated that the inspection service issuing the inspection certificates did not come within the jurisdiction of the Avocado Administrative Committee and that he had no personal control over the inspection of avocados. Dep. Tr. pp. 34, 35. The "business" of the committee is to make recommendations to the Secretary of Agriculture, not to inspect avocados. 7 C.F.R. 969.50.

The inspection certificates (otherwise unidentified) on which the summaries were based, were not prepared or made under the supervision or control of any employee of the

Avocado Administrative Committee. Dept. Tr. 35. Therefore, they are not records whose trustworthiness has been established by the testimony of a person who systematically kept or supervised the preparation of such records. The witness Biggar could only testify to their receipt and retention and not to the trustworthiness of their contents. No foundation has been laid either authenticating the inspection certificates or establishing that they were made in the regular course of a business under circumstances giving indicia of reliability. It follows that the exhibits in question, which are summaries of the contents of hearsay documents, are not business records reflecting transactions occurring in the course of the business of the Avocado Ad-[fol. 241] ministrative Committee. They are not therefore within the scope of 28 U.S.C. 1732.

Neither are these exhibits official records under 28 U.S.C. 1733. This statute provides:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> "(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

Defendants suggest that the Avocado Administrative Committee is not a federal agency within this statute. The committee consists of nine members selected by the Secretary of Agriculture. 7 C.F.R. 969.20. Five are producers of Florida avocados and four are handlers of Florida avocados. 7 C.F.R. 969.20. Their primary function is to recommend proposed administrative regulations to the federal Secretary of Agriculture. 7 C.F.R. 969.50. The committee represents and acts on behalf of the Florida avocado industry, not the federal government. Tr. 64. Its records therefore are not official records within 28 U.S.C. 1733.

Further, the "transactions" in question were the inspections made by an agency other than the Avocado Adminis-

trative Committee. The "memoranda" recording such a transaction would be the inspection certificate itself, not a summary based on such certificates. While the inspection certificates themselves, if authenticated, might be official [fol. 242] records, the summaries in question are not.

In addition, the presumption of impartiality attendant to official records is lacking here. The summaries were prepared by the witness Biggar, a pleasure employee of the administrative committee. Dep. Tr. 70. The committee itself is composed of growers and handlers of Florida avocados. 7 C.F.R. 969.20. Among these members were Harold Kendall and Fred Piowaty. These men are officers in the plaintiff corporations in this case and testified for plaintiffs. Dep. Tr. 69, 158, 249. Under these circumstances the bias of the witness Biggar casts shadows on the reliability of the exhibits prepared by him. These exhibits, therefore, cannot reasonably have the indicia of reliability and impartiality required under 28 U.S.C. 1733.

Defendants also object to the admission of these exhibits into evidence for the reason that they constitute inadmissible secondary evidence of the contents of other writings. The best or superior evidence of the contents of the inspection certificates are the certificates themselves. Summaries of authenticated books and records (themselves admissible in evidence) are admissible in evidence where the books and records have been physically produced in court. The rights of the litigants are protected because the original documents can be examined, and the person making the summary questioned. In this case the original inspection certificates have never been produced, and therefore the summaries thereof are inadmissible. Thus in *In re Bell-Tone Records, Inc.*, 91 F. Supp. 642, 644, the summary prepared by an accountant based upon his examination of books and records was excluded from evidence because the original [fol. 243] books and records were not produced in court. Similarly in *Berthold-Jennings Lumber Co. v. St. Louis Ry.* (8 Cir.), 80 F.2d 32, 44, partial copies of ledgers of grain commission firms made by an accountant before destruction of the ledgers, were held inadmissible where the ledgers were not produced in court.

[fol. 244]

B. Plaintiffs' Exhibits 6, 9 and 14 for Identification.

Plaintiffs' Exhibits Nos. 6, 9 and 14 for identification consist of summaries of federal regulations issued successively during the 1956-1957, 1957-1958, Florida avocado shipping seasons. Dep. Tr. 17, 20, 73. These summaries were prepared by the witness David M. Biggars, an employee of the Avocado Administrative Committee. Dep. Tr. 4, 17, 20, 23.

Defendants object to the admission into evidence of the exhibits on the grounds (1) the exhibits constitute inadmissible secondary evidence of the contents of the original regulations, and are not the best of evidence of such contents, (2) constitute inadmissible hearsay, (3) the exhibits do not constitute a written verbatim copy of the original regulations, and (4) there has been no authentication of the original regulations.

Presumably the original federal regulations, or authenticated copies, are available to plaintiffs. Since production is thus feasible, it should be required since every word and every part in the whole should be compared before the Court determines the total sense and effect that should be given it.

Plaintiffs, of course, may make appropriate reference to the regulations of the Secretary of Agriculture which are published in the Federal Register. The Court has stated that it will take judicial notice of these published regulations. This circumstance renders formal proof of the contents of the regulations unnecessary. This taking of judicial notice also reenforces defendants' argument that plaintiffs' exhibits Nos. 6, 9 and 14 constitute inadmissible hearsay summaries of the regulations in question, and should not be admitted into evidence, since alternative proof is open to plaintiffs.

[fol. 245]

C. Plaintiffs' Exhibits 12 and 13 for Identification.

Plaintiffs' Exhibits 12 and 13 for identification consist of excerpts from plaintiffs' exhibit 16 for identification, and a partial extract from unidentified regulations issued by

the Secretary of Agriculture. Dep. Tr. 30-31. Plaintiffs' witness Biggars (manager of the Avocado Administrative Committee) as a personal favor to Harold E. Kendall and Fred Piowaty, officers of plaintiff corporations, visited the University of Florida Sub-Tropical Experiment Station, Homestead, Florida, and copied onto exhibits 12 and 13 for identification portions of the records he found there. Dep. Tr. 28-29. Kendall and Piowaty were officers of plaintiff corporations, and also were members of the Avocado Administrative Committee. Dep. Tr. 158, 249, 42-43. The witness Biggars, at the time the exhibit was prepared, knew of the pendency of the lawsuit and that the exhibit could be used as an exhibit in said action by the plaintiff corporations. Dep. Tr. 41-42. Biggars admitted that he had no personal knowledge of the information he copied onto exhibits 12 and 13 for identification. Dep. Tr. 41.

Defendants object to the introduction into evidence of plaintiffs' exhibits 12 and 13 for identification on the grounds (1) that the information pertaining to oil tests is derived from exhibit 16 for identification, said exhibit 16 being inadmissible hearsay, (2) that that portion of exhibits 12 and 13 for identification which identifies the person making the request for oil content testing, and identifying the owner of the avocado grove concerned, constitutes inadmissible hearsay, and (3) that the lower portion of the exhibit constitutes inadmissible secondary evidence of the contents of the unidentified federal regulations.

[fol. 246] Plaintiffs' witness Harold E. Kendall, on cross-examination admitted that he had never personally delivered any of the avocados listed on exhibit 13 to the Sub-Tropical Experiment Station. Dep. Tr. 193-194. His personal involvement was the giving of instructions to the South Florida Growers, Inc., field superintendent, that avocados be picked and delivered to the experiment station. Dep. Tr. 194. The testimony of Kendall is the only testimony connecting the plaintiff South Florida Growers, Inc., with exhibit 13 for identification. Since Kendall's testimony in this regard is not based on personal knowledge, he is not qualified as a witness to testify thereon. Exhibit 13 itself is therefore inadmissible hearsay since its contents are identified only through the testimony of Kendall and Biggars.

Plaintiffs' witness Fred Piowaty on cross-examination similarly admitted that he had never personally delivered any of the avocados listed on exhibit 12 to the Sub-Tropical Experiment Station. Dep. Tr. 267. Nor had he personally picked any of the fruit. Dep. Tr. 268. Thus, Piowaty had no personal knowledge of the facts recited in exhibit 12, and his testimony constitutes inadmissible hearsay. Since exhibit 12 for identification rests on the hearsay testimony of Biggars and Piowaty, it too constitutes inadmissible hearsay.

Plaintiffs' exhibits 12 and 13 for identification are extrajudicial writings which are offered to prove the truth of the matters asserted. As such they constitute inadmissible hearsay. The testimony of the person preparing the document shows that it was not prepared in the course of the business of the Avocado Administrative Committee. Dep. Tr. 38-39. The title and form of this document show that it was prepared for litigation at the request of plaintiffs. Dep. Tr. 40-42. Documents prepared for litigation are not [fol. 247] admissible as business records. *Palmer* v. *Hoffman*, 318 U.S. 109, 114. It follows that exhibits 12 and 13 for identification constitute inadmissible hearsay and should be excluded from evidence.

D. Plaintiffs' Exhibit 15 for Identification.

Plaintiffs' Exhibit 15 for identification consists of bulletins issued by the Avocado Administrative Committee from May 15, 1957 to October 9, 1957. The bulletins relate recommendations made by the committee to the Federal Secretary of Agriculture. As recommendations, the bulletins have no official status and are irrelevant. If tendered to prove the contents of the actual regulations, the exhibits are inadmissible secondary evidence. The regulations themselves are the best evidence of their contents. The exhibits are similarly inadmissible if considered as summaries of federal regulations (otherwise not identified) since they would then constitute inadmissible secondary evidence of the contents of the regulations. *In re Bell Tone Records, Inc.*, 91 F.Supp. 642, 644.

E. Plaintiffs' Exhibits 17 and 21 for Identification.

Plaintiffs' Exhibits 17 and 21 for identification consist of typewritten documents headed "Avocado Shipments Barred from Sale in California." Exhibit 17 pertains to plaintiff South Florida Growers Association, Inc. Exhibit 21 pertains to plaintiff Florida Lime and Avocado Growers, Inc.

The statements in these documents, being in writing and not oral, were not made in the presence of this Court; nor were they made in the presence of the officer taking the depositions. Since these documents are being offered to prove the truth of the matter asserted, they are hearsay. [fol. 248] These documents are not within the business records exception as defined in 28 U.S.C. sec. 1732, because there is no evidence that they were "made in regular course of any business." Dep. Tr. pp. 175-180, 203-208; *U. S.* v. *Indian Trailer Corp.*, 226 F.2d 595, 599-600 (7th Cir. 1955). In particular there is no evidence that summaries of shipments rejected in California were regularly made for all shipments rejected in California. Nor is there evidence that summaries of shipments rejected in California were regularly made within a reasonable time of their dispatch or rejection.

Records prepared for litigation are not admissible as business records. *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). The title and contents of these documents clearly show that they were prepared for this very litigation.

Both exhibits summarize seven groups of transactions and events, each group consisting of the shipping of certain avocados to California, the receipt of notice of noncompliance "upon test of oil content," their reshipment and eventual sale outside California, and the alleged resulting "loss," i.e., lessening of gross return. Dep. Tr. 203-206, 264-267.

Even if the ex parte claims made in plaintiffs' exhibits 17 and 21 for identification were made orally by Mr. Kendall in the presence of the officer taking his deposition, these statements would not be admissible in evidence at the trial. The witness Kendall admitted that the statements in exhibit 17 for identification were a "summary of what appears in the books and records of [his] company. . . ." Dep. Tr. 178. The witness Piowaty testified that Exhibit 21 for identification was a "summarized statement from the books and

records of [his] company. . . . " Dep. Tr. 128. Neither witness claimed, nor was shown to have, personal knowledge of the transaction reflected in these books and records. Con-
[fol. 249] sequently, neither Kendall nor Piowaty was qualified to make the statements as set forth in the exhibits, and such statements constitute inadmissible hearsay. Even had the witnesses recited the contents of these unauthenticated and unidentified records, the recitation would not be admissible in evidence because such testimony does not constitute the best evidence of the contents of such records.

Had the records, whatever they were, been offered in evidence, they would remain inadmissible hearsay unless shown to be entries made by employees of the plaintiff corporations which, in addition, met the requirements of the business records hearsay exception. 28 U.S.C. 1732. No such showing has been made. Dep. Tr. 255-256; 175-178. For example, a memorandum of a phone conversation with a west coast receiver giving an "assurance" of a sale on the west coast would not come within the business records exception. Dep. Tr. 266-267. *United States v. Indian Trailer Corp.* (7 Cir.), 226 F.2d 595, 595-600.

Defendants further object to the introduction in evidence of that part of plaintiffs' Exhibit 21 for identification which summarizes shipments made in 1955. The record shows that these shipments were made by a separate corporation, not by the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 61; 249-250; stipulation of the parties dated September 29, 1960, on file herein. Since a different corporate entity made the shipments, the witness Piowaty, an officer of Florida Lime and Avocado Growers, Inc., is not qualified to testify thereto, and such statements constitute inadmissible hearsay. This matter is irrelevant since any loss fell on the shareholders of the predecessor cooperative, not on the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249-250.

[fol. 250]

F. Plaintiffs' Exhibit 22 for Identification

Plaintiffs' Exhibit 22 for identification is an unverified copy of a hold report form under the heading "Los Angeles County Agricultural Commissioner." Defendants object to

the introduction of the exhibit in evidence on the grounds that (1) its authenticity has not been shown, and (2) the document constitutes inadmissible hearsay.

The only testimony regarding Exhibit 22 for identification is that of witness Piowaty, Secretary of the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249. Piowaty testified (1) that the exhibit had been procured by his "consignee in Los Angeles," and (2) that it contained a memorandum of oil tests. Dep. Tr. 258. No showing is made either establishing the authenticity of the document or identifying who made the entries thereon. Without such foundation, Exhibit 22 for identification is inadmissible hearsay. Similarly, no showing is made that the witness had first-hand knowledge of the transactions reflected in the exhibit. The witness is therefore not privileged to testify regarding the transaction, and his statements constitute inadmissible hearsay.

[fol. 251]

G. Plaintiffs' Exhibits 23, 24, 25 and 26 for Identification.

Plaintiffs' Exhibits 23, 24, 25 and 26 were marked for identification at the trial February 7 and 8, 1961. These exhibits consist of a number of treatises and one chart:

Exhibit 23 for identification:

(1) Typewritten pages entitled, "General Information on Avocado Research."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 67, 1954, entitled, "The Relation of Maturity to Quality in Florida Avocados."

(3) A collection of writings headed, "Evidence Presented at Hearings Before Secretary of Agriculture." March 8, 1954, by Paul L. Harding.

Exhibit 24 for identification:

(1) Typewritten pages entitled, "General Information on Avocado Research, 1954-1955."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 68, 1955, entitled, "Relation of Maturity of Florida Avocados to Physical Characters."

Exhibit 25 for identification:

(1) Typewritten pages entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. LXX, 1957, entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(3) Chart headed, "Some Physical and Chemical Changes in the Principal Varieties of Florida Avocados Picked Above and Below the Regulated Minimum Weight, 1955-1956."

[fol. 252] Exhibit 26 for identification:

(1) Typewritten pages entitled, "Resume of Progress of Studies on Florida Avocado Maturity" by Thurman T. Hatton, Jr.

Defendants object to the introduction in evidence of plaintiffs' Exhibits 23, 24, 25 and 26 for identification on the grounds that these exhibits constitute (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) are irrelevant.

The offer into evidence of these exhibits seeks to employ testimonially controversial statements made out of court, i.e., Tr. 70-71. Since offered to prove the truth of the matter asserted, the exhibits are inadmissible hearsay. *United States* v. *Paddock*, 68 Fed. Supp. 407, 409; *Gallagher* v. *Market Street Ry.*, 67 Cal. 13, 17. No necessity is shown for plaintiffs' use of this material since plaintiff produced an expert witness in court who covered the same matters in his direct examination. Tr. 2-97.

A part of Exhibit 23 for identification consists of material apparently introduced at a hearing before the Secretary of Agriculture. The Court on its own motion excluded testimony regarding this exhibit as immaterial. Tr. 26. In addition, the exhibit constitutes inadmissible hearsay.

Plaintiffs sought to qualify Exhibits 23, 24, 25 and 26 for identification under the official records exception to the hearsay rule. Tr. 41. However, the testimony of the witness Harding established only that these exhibits were parts of the records in his custody. No showing was made that these particular exhibits (as contrasted to the original records) were books or records of account or minutes of proceedings of any department or agency of the United States. [fol. 253] U.S.C. 1733. The reprints from the publication, "Proceedings of the Florida State Horticultural Society" are not records of an agency or department of the United States. Neither are they business records. 28 U.S.C. 1732. A copy of Time Magazine could possibly be found in Mr. Harding's files. But this circumstance does not convert the magazine into an official or a business record.

Further, statements which require the exercise of judgment, the expression of opinion, and the making of conclusions are excluded from evidence, even though contained in official records. *Pruett* v. *Burr*, 118 Cal.App.2d 188, 200-201. Such declarations are excluded because there is no opportunity to cross-examine the declarant to test his knowledge, veracity and demeanor. Similarly, such statements of fact are inadmissible where the declarant obtained the information from third parties. Compare *Olander* v. *United States* (9 Cir.), 210 F.2d 795, 802.

A further objection appears in that the material included in the chart, included as part of Exhibit 25 for identification, consists of a summary of records in the office of Mr. Harding. Tr. 18. However, only a portion of the original records were produced in Court. Tr. 25. Since the original records were never produced in Court, the summaries thereof are inadmissible. *Berthold-Jennings Lumber Co.* v. *St. Louis Ry.* (8 Cir.), 8 F.2d 32, 44; *In re Bell Tone Records, Inc.*, 91 F.Supp. 642, 644.

If it be assumed that the palatability test results shown on the chart are the same tests described in the testimony of Mr. Harding, then the exhibits constitute inadmissible hearsay. Tr. 78. Tables of data showing the responses of members of a taste panel to food presented to them con- [fol. 254] stitute hearsay evidence. The original scoring by members of the taste panel were made outside of the courtroom. The testimony in the courtroom is merely a repeating of the previous extra-judicial statements. Since the data is offered to prove the truth of the matter asserted, it constitutes inadmissible hearsay. Stated differently, the witness has no personal knowledge of the facts except as narrated to him. He is therefore not qualified to testify on the matter. The declarants are the members of the panel who are unavailable for cross-examination. Defendants therefore have no opportunity to test the sincerity, narrative ability, perception or memory of the declarants.

This class of evidence has been rejected by the courts. In *United States* v. *International Harvester Co.*, 274 U.S. 693, the plaintiff had introduced into evidence over objection a report of the Federal Trade Commission which in turn was based on data furnished it by various manufacturers of agricultural implements concerning their cost, profits and business operations. In holding that the trial court erred in admitting this report in evidence, the court stated: "But it is entirely plain that to treat the statements in this report—based upon an ex parte investigation . . . —as constituting in themselves substantive evidence upon the questions of fact here involved violates the fundamental rules of evidence entitling the parties to a trial on issues of fact, not upon hearsay, but upon the testimony of persons having first-hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination" (*United States* v. *International Harvester Co.*, 274 U.S. 693, 703). Similarly, the Delaware Supreme Court in *Coca-Cola Co.* v. *Nehi Corporation*, 27 Del. 318, 36 Atl.2d 156, 160, held inadmissible a word association test conducted by professors of psychology in the college classroom, [fol. 255] the matter being hearsay and the declarant not being subject to cross-examination. In *Elgin National*

Watch Co. v. *Elgin Clock Co.*, 26 Fed.2d 376, the plaintiff offered in evidence the affidavit of a member of a New York advertising firm giving his opinion regarding the meaning of the word "Elgin" to retail jewelers, said affidavit being based on the answers to 2000 questionnaires distributed to retail jewelers. The evidence was rejected as hearsay, the court saying: "The affidavit submitted for filing is one based, not upon personal knowledge of the affiant or upon facts admitted in evidence, but, on the contrary, is predicated solely on the unverified statements or opinions of persons not called as witnesses." 25 Fed.2d 376, 378.

Plaintiffs are not helped by the circumstance that the witness in question may be an "expert" on food tasting. In limited cases an expert may express an opinion on matters within his special competence. But in such case the witness must base his opinion (1) on actual personal observation or (2) on facts in evidence which are stated in a hypothetical question. 2 Wigmore on Evidence [3d ed.] secs. 674-682. Neither condition is satisfied where the knowledge of the witness is derived from statements of members of the taste panel.

Lastly, these exhibits are irrelevant. The validity of the federal regulations is not in issue.

[fol. 256]

H. Depositions of Kendall, Piowaty, Biggars and Wimbish

Defendants object to the introduction in evidence of the depositions of plaintiffs' witnesses Harold E. Kendall, Fred Piowaty, David M. Biggars and R. M. Wimbish. Kendall is President of the plaintiff South Florida Growers, Inc. and Piowaty is Secretary of the plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 158, 249. Their depositions, in effect, are the depositions of the plaintiff corporations.

Rule 26(d)(3), Federal Rules of Civil Procedure, provides:

> "(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, . . . unless it appears that the *absence* of the

witness was procured by the party offering the deposition;" (Emphasis added).

The record is silent as to why these witnesses did not attend the trial.

Defendants suggest that the quoted language, fairly read, precludes a party from using his own deposition as evidence at the trial unless it is shown that he could not be present at the trial and that his absence is not due merely to a preference to use his deposition rather than to testify orally at the trial. This interpretation would be consistent with the principle that "The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." *Napier* v. *Bossard* (2 Cir.), 102 F.2d 467-469. "For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of the narratives." [fol. 257] *Arnsten* v. *Porter* (2 Cir.), 154 F.2d 464, 470. Compare Rule 26(d)(5) which establishes the "importance of presenting the testimony of witnesses orally in open court." This interpretation of Rule 26 is consonant with the rule that a plaintiff can be compelled to come to the district in which the action is filed to give his deposition. *Collins* v. *Wayland* (9 Cir.), 139 F.2d 677, 678.

The depositions of Kendall and Piowaty should be excluded for a further reason. Plaintiffs made no showing at the trial that these witnesses were a greater distance away than 100 miles. Rule 26(d)(3), Federal Rules of Civil Procedure; compare *Mercado* v. *United States* (2 Cir.), 184 F.2d 24, 26-27. Similarly, no such showing was made for the witnesses Biggars and Wimbish, and their depositions should be excluded from evidence. Ibid.

I. Objections to Specific Portions of Plaintiffs' Depositions

Defendants further object to the following portions of the depositions of the witnesses David M. Biggars, Roy W. Harkness, Harold E. Kendall, and Fred Piowaty.

I. *Witness David M. Biggars*

Deposition Transcript

ll. 15-19, p. 9	Answer is based on hearsay.
ll. 20-24, p. 9	Expression of opinion.
ll. 4-17, p. 18	Answer is based on hearsay.
ll. 23, p. 29 to "concerned" in l. 1, p. 30	Answer based on hearsay.
ll. 2-9, p. 71	Question is leading and suggestive.
ll. 18-22, p. 75	Question is leading and suggestive.
ll. 19-20, p. 76	Question is leading and suggestive.

II. *Witness Roy W. Harkness*

ll. 22-25, p. 93	Question is leading and suggestive.
[fol. 258] ll. 13-18, p. 108	Answer is based on hearsay. In cross-examination Dr. Harkness testified that he had no personal knowledge regarding the source and date of picking of the avocados tested, but obtained his knowledge from the person who brought the fruit into the Sub-Tropical Experiment station. Dep. Tr. 114-119.

III. *Witness Harold E. Kendall, President, Plaintiff South Florida Growers Association, Inc. Dep. Tr. 158:*

ll. 18-21, p. 161	Expression of opinion and belief.
l. 2, commencing with "I" to l. 8, p. 163	Expression of opinion or belief, and answer based on hearsay.

Deposition Transcript	
l. 25, p. 165, to l. 6, p. 166	Question is leading and suggestive.
ll. 14-24, p. 167	Answers are based on hearsay. In cross-examination Kendall testified that his employees picked the avocados and delivered them to the experiment station, not the witness. Dep. Tr. 194.
ll. 8-12, p. 168	Answer based on hearsay. The witness had no personal knowledge of the transactions reflected in exhibit 13 for identification. Dep. Tr. 194.
ll. 12-20, p. 169	Answer based on hearsay, i.e., the contents of the unidentified document from which the witness was reading. Dep. Tr. 169.
ll. 5-19, p. 170	Answer based on hearsay. The witness had no personal knowledge of the transaction reflected in exhibit 13 for identification. Dep. Tr. 194.
l. 6, commencing with "because" to l. 17, p. 186	Answer based on hearsay.
l. 13, commencing with "he" to l. 3, p. 189	Answer based on hearsay.

[fol. 259]

IV. *Witness Fred Piowaty, Secretary, Plaintiff Florida Lime and Avocado Growers, Inc. Dep. Tr. 249:*

ll. 21-25, p. 254	Answer is based on hearsay. In cross-examination Piowaty testified that he had no first-hand information regarding the picking or delivery of the avocados delivered to the experiment station. Dep. Tr. 267-268.

Argument

I. The California Avocado Maturity Law Does Not Constitute an Undue Burden on Interstate Commerce

California's avocado maturity law was enacted in 1925. Stats. 1925, Chap. 350, pp. 625, 633. The purpose of the statute is to reach a domestic situation—the marketing of immature avocados—in the interest of the welfare of consumers and producers of avocados. Such a state enactment is not invalid under the commerce clause merely because it incidentally or indirectly affects interstate commerce. See *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351, where the Court said:

> ". . . One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce . . .
>
> ". . . The purpose of the statute under review obviously is to reach a domestic situation in the interest [fol. 260] of the welfare of the producers and consumers of milk in Pennsylvania."

The California avocado standardization law meets the test of constitutionality stated in the recent case of *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 448:

> ". . . State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. [Cases cited.]"

In *Simpson* v. *Shepard*, 230 U.S. 352, 408, the Supreme Court stated:

> "State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and

imposition are valid when reasonable in their requirements and not in conflict with federal rules, though they may affect interstate commerce . . ."

The Supreme Court in the *Huron Portland Cement* case emphasized that the commerce clause leaves the states with broad powers in regulating commerce, stating:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution" (Id. at 443, 444).

[fol. 261] In attacking the California enactment as constituting an undue burden on interstate commerce, the plaintiffs claim that the law is "inherently discriminatory." Tr. 173. No claim is made that the California law is enforced dishonestly against Florida avocados. Tr. 173.

Plaintiffs argue that the West Indian varieties are low in oil content. Plaintiffs' Brief 10. However, with the exception of the Waldins, the West Indians are "minor varieties." Dep. Tr. 164-165. In the 1959-1960 shipping season, the West Indian varieties, other than Waldin, constituted only 3.02% of the total Florida crop.[4] Defendants' Exhibit E in evidence. Even if the variety Waldin were included, this figure would be 12.17% of the total Florida crop. *Ibid.*

Dr. Harkness, called as a witness by plaintiffs, testified that "the Waldens did not reach eight percent [oil content], let's say, until December, which is the normal time for picking Waldens." Dep. Tr. 103. It would appear therefore, that Waldins, although considered a West Indian

[4] See footnote 1, supra, at page 6.

variety, cannot fairly be included with those varieties with low oil content.

Two avocado marketing experts testified at the trial that it would not be commercially profitable to market Florida's West Indian varieties in California. Tr. 164, 179. Defendants' witness Pressley Wiggs testified that the long transit time from Florida to California, and "a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage," leaves insufficient time for the retailer to sell the fruit and make a profit. Tr. 164-165. Defendants' witness Albert C. Jones testified that the West Indian varieties such as Fuchs, Pollocks, Waldin and [fol. 262] Hicksons were poor shippers. Tr. 178. He testified that in his marketing experience he had found that the poor shipping qualities of West Indian varieties and their short shelf life resulted in marketing losses which built up a sales resistance not only to the West Indian varieties, but to all varieties of avocados. Tr. 179-180.

The testimony of these marketing experts was corroborated by plaintiffs' witness Harding who testified that the West Indian varieties soften more quickly after picking and have a shorter shelf life than the higher oil content hybrid varieties. Tr. 71-72. Therefore, the fruit must be moved to market faster and precautions taken to insure quick retail sale. Tr. 72.

Significantly, the proportion of West Indian varieties (excluding Waldins) dropped from 10.47% in the 1955-1956 season to 3.02% in the 1959-1960 season. Defendants' exhibit E in evidence. It may be inferred that this decrease was due to the indicated poor keeping and shipping qualities of the West Indian varieties, which in turn has caused a shift of production into the high oil content hybrid varieties.

Kendall testified that the hybrid varieties of avocados had been planted extensively in Florida in the ten years preceding 1958. Dep. Tr. 164. Defendants' Exhibit E in evidence. With respect to these hybrid varieties, plaintiffs' witness Harkness stated that ". . . the late maturing varieties did not reach or approach edible condition, or judged by the people who ate them, until the oil content

was comparatively high, perhaps seven to eight percent, or higher." Dep. Tr. 103.

The record then, shows that plaintiffs' charge of inherent discrimination rests on the fact that some of the West [fol. 263] Indian varieties, representing only a small part of Florida avocado production, cannot meet the 8% California oil standard. These West Indian varieties are poor shippers and have a shorter "shelf life." In the opinion of two expert witnesses with long experience in marketing, it would not be commercially profitable to market West Indian variety avocados in California for reasons other than of the 8% oil content requirement.

The hybrid varieties are growing in commercial importance in Florida. In the 1959-1960 season they constituted 87.83% of all commercial production in the State of Florida. Defendants' Exhibit E in evidence.[5] Since the hybrid varieties have been planted extensively in Florida in recent years (Dep. Tr. 164), it can be expected that they will continue to grow in importance as the West Indian varieties decline.

The hybrid varieties have both the shipping qualities and the oil content for successful marketing in California. Indeed, as counsel for plaintiffs brought out at the trial, Calavo Growers of California marketed in California approximately $1,000,000 worth of Florida avocados per year from 1951 to 1955. Tr. 166-167. See Defendants' Exhibits A, B, C and D in evidence for sales by plaintiffs in California.

Why, then, are plaintiffs seeking to have the California avocado maturity law declared invalid? Defendants' theory of the case is that plaintiffs are motivated by a strong economic desire to pick their hybrids early in the season and rush them to the California markets when California avocado production is light and the market price is high. If the plaintiffs were not so eager to hit the early California market with these hybrids, they would have no [fol. 264] difficulty complying with the 8% oil statute.

The evidence bears this out. The low point in California avocado production and sales occurs in the months of Sep-

[5] See footnote 1, supra, at 6.

tember, October and November. Tr. 162. Avocado prices in California break sharply thereafter as the Fuerte crop matures and begins hitting the market. Tr. 163. The Fuerte is the leading California variety. Tr. 116. To illustrate, the f.o.b. Los Angeles price for a 13-pound net weight container of avocados ranged from $4.50 to $5.50 in September and October, 1960. Tr. 163. The price broke in late November under the depressing effect of the Fuerte production. Tr. 163. In early February, the price range was down to $2.75 to $3.00. Tr. 163.

Plaintiffs thus have a powerful economic incentive to get into the California market ahead of the California Fuerte crop. What plaintiffs would obviously like to do is market the Lula, Booth 8, Booth 7 and other hybrids in September, October and early November, before they reach their full maturity and oil content.

Plaintiffs have experienced little difficulty with the 8% oil requirement except when they have shipped small fruit early in their season. For example, plaintiff South Florida Growers marketed 8 shipments of avocados in California in November of 1955, 11 shipments in December of 1955, and 3 shipments in January of 1956. Of these 22 shipments, all passed the California oil content requirement with one exception. 282 boxes of small fruit in one of the earliest shipments were found deficient in oil content, although 326 boxes in the same shipment containing larger fruit passed inspection. Plaintiffs' Exhibit Q for identification. Of 35 shipments marketed by this plaintiff in California in November and December of 1956 and January of 1957, all [fol. 265] passed inspection except for one November shipment in which 721 flats of small fruit were found low in oil content, while 1550 flats of larger fruit in the same shipment passed inspection. Plaintiffs' Exhibit R for identification.[a]

Defendants submit that the record fails to support plaintiffs' claim of "inherent discrimination."

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[a] Plaintiff South Florida Growers, Inc., claims successful sales in California as early as September and October. Dep. Tr. 211

II. The California Avocado Maturity Law Does Not Deny Plaintiffs Equal Protection of the Laws

The Equal Protection Clause of the Fourteenth Amendment does not require perfection in legislative classifications. *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385. Its prohibition goes no further than the invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. A legislative classification will stand if any state of facts reasonably can be conceived that would sustain it. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 528.

The California Legislature did not act arbitrarily or capriciously in enacting the avocado maturity statute. The requirement of 8% oil content is rationally related to the legislative objective of the statute, i.e., keeping immature avocados off the market. Tr. 107, 111; 136-137; 164.

The statute has worked fairly and effectively as an avocado maturity standard for years. Tr. 106, 111, 136, 164.

Plaintiffs ask this Court to declare the California statute unconstitutional because it discriminates against avocados which reach maturity at less than 8% oil content. Pls. Br., p. 34. Plaintiffs refer to West Indian varieties which represent only a small percentage of the Florida avocado production and which are of declining commercial impor-
[fol. 266] tance. *Supra*, p. 7. Moreover, as we have seen, the effect of the California statute on West Indian varieties is hypothetical because of their high perishability. *Supra*, pages 52 to 54. Their shipping qualities are so poor and their shelf life so short that it would not be economically feasible to market them in California, even in the absence of the 8% oil statute. *Supra*, p. 52.

Just as the record fails to support plaintiffs' claim of discrimination under the Commerce Clause, it fails to support plaintiffs' claim of discrimination under the Equal Protection Clause.

[fol. 267]

III. There Is No Conflict Between the Federal Marketing Regulation and the California Avocado Maturity Law.

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, it is asserted, gives to plaintiffs the right to

market their avocados in California free of state inspection, and free of the state police power to protect California consumers from immature fruit. The issue raised is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the States. The policy of accommodation formulated by the United States Supreme Court is: "We agree, that the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243.

The objective of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, is stated to be the establishment, by exercise of the power conferred on the Secretary of Agriculture, of "orderly marketing conditions for agricultural commodities in interstate commerce," such as will tend to establish "parity prices" for farm products. Section 1, Agricultural Marketing Agreement Act of 1937.

The goal of the California standardization statute is "To promote the deevlopment of the California fruit, nut and vegetable industry, and to prevent deception in the packing, marking, shipping or sale of fruits, nuts and vegetables for state, interstate or foreign commerce. . . ." California Statutes of 1925, Chapter 350, pages 625, 633.

As outlined, the federal act is designed to support the [fol. 268] prices paid for agricultural commodities moving in interstate commerce. On the other hand, the state enactment is a police measure intended to keep unfit agricultural commodities off the market. No conflict of legislative objective exists between the two laws.

Plaintiffs in this case place heavy reliance on the fact that their avocado shipments carry certificates showing federal inspection. It is asserted that this certificate frees such avocados from inspection in California terminal markets. However, in a comparable case, the Supreme Court recently upheld the additional state inspection standard. In *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, the appellant shipowner had obtained Coast Guard safety inspection of its ships' boilers, and had obtained a certificate authorizing

operation of the ships under federal law. Upon docking in the City of Detroit, that city commenced criminal proceedings under the Detroit Smoke Abatement Code after the boilers had emitted excessive smoke. The state inspection act was held valid despite the fact that appellant could not prevent the emission of excessive quantities of smoke from the federally approved boilers then installed on the ships.

The Court stated: "The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation. . . . By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community." Id., at 445. After thus finding that there was no conflict between the two laws, the Court then held that appellant's federal license availed it nothing, saying: "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal [fol. 269] incidents of local police power, not constituting a direct regulation of commerce." Id., at 447. Similarly, in the instant case, the mere fact of federal inspection does not afford plaintiffs immunity from state inspection.

In enacting the Federal Marketing Act, Congress did not intend to occupy the field to the exclusion of state regulation. *Parker* v. *Brown*, 317 U.S. 341, 358. In *Hood & Sons* v. *DuMond*, 336 U.S. 525, 542, the Supreme Court stated:

> "We assume, though it is not necessary to decide, that the Federal [Agricultural Marketing Agreement] Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause."

The core of plaintiffs' argument on pre-emption is that the state cannot subject products to additional regulation once they have entered the stream of commerce pursuant to a federal marketing order. However, the Federal Marketing Act expressly contemplates dual regulation by the federal government and the states. Section 18, Act of August 24, 1935, 49 Stat. 750, 767.

Contrary to what plaintiffs here argue, it was made clear during the House debates on the Federal Act that products

marketed under a federal marketing order would not be immune from state regulatory statutes. In response to a question on the floor of the House regarding the effects of [fol. 270] the 1935 amendment[7] on the New York state milk marketing regulations, Representative Martin Jones, Chairman, House Agricultural Committee, stated: ". . . within the state, of course, such laws may be enacted as the state deems proper. We do not undertake to keep them from shipping [milk] in, and we do not authorize them to ship [milk] in. We say when they ship from some other State, they must ship in subject to the same regulatory measures that exist in a particular area. In many instances the states may wish to enact supplementary legislation, if they wish to make the program fully effective." 79 Cong. Rec., p. 9465, 74th Cong., 1st Sess. In House debate, Representative Andresen from Minnesota stated: ". . . The farmers out in our section [Minnesota] will have to meet the [milk] grade and sanitary requirements of the State of New York or the other States. . . ." 79 Cong. Rec., p. 9480, 74th Cong., 1st Sess.

[fol. 271] Plaintiffs rely on *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, Plfs.' Br., p. 22. In this case an Alabama inspection act establishing standards for "renovated butter" was held to conflict with a federal statute which authorized condemnation of "packing stock butter," a product manufactured from "renovated butter." The conflict found by the court was twofold: (1) the state confiscation interfered with the federal inspection and (2) it destroyed the product intended to be subsequently regulated and taxed by Congress. "The argument that it is improper to infer a restriction on [state] confiscation of material when [fed

[7] Section 8(c) of the Act of May 12, 1933, 48 Stat. 31, 34, authorized the Secretary of Agriculture to license all handlers and processors engaged in handling agricultural commodities in interstate commerce. Such licenses could be revoked if such person violated the marketing regulations issued under the Act. Section 8(c) was stricken out by the Act of August 24, 1935, 49 Stat. 750, 753, and replaced by a new section 8(c) which authorized the issuance of marketing "orders" governing the handling of agricultural commodities in interstate commerce. The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, re-enacted section 8(c) of the 1935 Act.

eral] confiscation of product is permitted fails to give weight to the difference between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. *The latter type is permissible under all the authorities.*" (Emphasis added.) Id., at 162. The operation of the federal avocado shipping restrictions ceases after the avocados leave the Florida area of production. 7 C.F.R. 969.4. Hence there is no conflict in administration of the federal enactment by subjecting these avocados to subsequent state inspection. The quoted language from the *Cloverleaf* case, 315 U.S. 148, 162, indicates that a different state food inspection requirement in the state of consumption is constitutionally permissible.

Defendants defend the state law as a reasonable effort by the California legislature to protect its citizens from immature food. The facts are in this case similar to those in ***Reid* v. *Colorado***, 187 U.S. 137. Appellant Reid had obtained federal disease inspection of his cattle in Texas and, upon shipment of the cattle to Colorado, he had refused to pay for state disease inspection. His criminal conviction [fol. 272] for having failed to obtain such inspection was affirmed, even though there was no proof that the particular cattle in question were diseased. The court found no conflict between the state and federal inspection statutes since the federal act provided for federal-state cooperative disease control programs. See also *Mintz* v. *Baldwin*, 289 U.S. 346, holding that a New York dairy cattle quarantine law was valid and not in conflict with the federal Cattle Contagious Diseases Act, 32 Stat. 791.

[fol. 273]

IV. The California Maturity Statute Has the Effect of Complementing the Federal Regulation Rather Than Conflicting With It.

Avocados are unique in that they are ordinarily purchased in a retail grocery store in a hard inedible condition, with the purchaser keeping the avocado at room temperature for several days to allow a further maturation and softening of the fruit. Tr. 107, 160. If at the end of

this waiting period, and with a salad ready to serve, the avocado is shriveled and has a bitter taste, the housewife is unlikely to purchase more avocados. Tr. 162. The result would be that consumer demand would drop and the avocado growers of both Florida and California would sell fewer avocados. Tr. 162.

The Secretary of Agriculture found, with respect to Florida avocados, that:

> "There has not been developed any satisfactory outlet for avocados other than the fresh market. The growers and handlers of Florida avocados have been accustomed to sell in fresh market channels the entire harvested production of Florida avocados, including fruit which is immature and otherwise of poor quality and undesirable appearance. This has tended to reduce the demand, and hence the market prices received, for Florida avocados. There are no officially established grade standards for avocados. Hence, Florida handlers have endeavored to fix their own grades for their individual packs and to market under such grades. However, the differences, or lack of uniformity, in these grade designations have tended further to create confusion in the minds of the buyers. In addition, many handlers have varied their individual grade standards to reflect variations in the supply, [fol. 274] quality and demand for Florida avocados during a particular season. Thus, Florida avocados of undesirable quality frequently have been marketed in a manner designed to indicate that such avocados were of desirable quality. This situation has resulted in considerable confusion in the minds of buyers concerning the quality of Florida avocados and has created lack of confidence in such fruit. The existence of this undesirable situation is generally recognized by the growers and handlers, and the consensus of opinion is that it can be resolved only by the imposition of standards of quality and maturity as a condition precedent to the marketing of Florida avocados. . . ." 7 C.F.R., Part 969, Vol. 19, p. 2419.

These findings are strikingly similar to those of the University of California:[8]

> "In order to provide for uniformity in the maturity of the fruit at the time of harvesting and especially to prevent the sale of immature avocados, a practice which had become a menace to the industry, the California avocado growers in 1925 succeeded in having a state maturity standard of 8 percent fat or oil content established. This action has been productive of very great benefit to the industry in that it has effectively eliminated immature fruit, mostly windfalls or stolen fruit, from the markets."

In short, both the federal regulation and the California statute have the effect of keeping immature avocados off the market. To this extent, they tend to complement [fol. 275] each other rather than conflict. No one would seriously contend that either standard is perfect or 100% effective in accomplishing its purpose. Legislative or administrative standards of general application are never perfect, and perfection is not required of them. *cf. Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385. No doubt some immature Florida fruit is shipped into interstate commerce even after passing inspection under the federal regulation. The imperfections in the federal size and picking date standards of maturity were noted by the expert witnesses. Tr. 62, 80, 143. Both standards undoubtedly keep off the market most fruit that is immature. But they do not assure that all fruit that does pass inspection is mature although this is what plaintiffs must argue when they contend that a federal inspection certification necessarily stamps their fruit as mature.

Defendants submit that plaintiffs are in error in contending that the federal inspection certificate gives them a license to be free of state regulation. To go back to the recent words of the Supreme Court, "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police

[8] The California Avocado Industry, Calif. Ag. Ext. Service, Univ. of Calif., Circular 43, April 1930, p. 39.

power, not constituting a direct regulation of commerce." *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 447.

In summary, the federal regulation and the state statute are not in direct conflict. They can consistently stand together. *cf. Sinnot* v. *Davenport*, 22 How. 227, 243. Congress clearly did not intend the Federal Marketing Act to pre-empt the field to the exclusion of state regulations. The Federal Act provides what are essentially self-help remedies for agriculture. The members of an industry, such as the Florida avocado industry, take the initiative and [fol. 276] exercise control in formulating, adopting and administering a marketing regulation, subject only to approval by the Secretary of Agriculture. Tr. 63-64.[9] It cannot be imagined that Congress intended that these self-help regulations could be used by an industry to nullify the enactment of a State Legislature.

[fol. 277]

V. Plaintiffs Have Not Shown Sufficient Economic Injury to Justify Equitable Relief by This Court.

Plaintiffs filed their complaint challenging the validity of the California avocado maturity statute on November 13, 1957. On March 14, 1958, defendants moved to dismiss the complaint. The principal ground for defendants' motions to dismiss was that plaintiffs had made an insufficient showing of injury to warrant the invocation of the court's discretionary powers to interfere with a state's enforcement of its own laws. Defendants relied upon such bench mark cases as *Douglas* v. *Jeannette*, 319 U.S. 157, and *Spielman Motor Company* v. *Dodge*, 295 U.S. 89. These cases and others establish an important principle of judicial restraint followed by federal courts in the exercise of their powers of equity against state officials enforcing state laws.

The Supreme Court has said that a plaintiff asking a federal court of equity to disturb the delicate balance of

[9] The Avocado Administrative Committee has the power to exempt any person's avocados from compliance with the federal regulations establishing date, weight and size shipping instructions. The person need only furnish proof "satisfactory to the committee" that his avocados are "mature." 7 C.F.R. 969.53.

our federal-state relations by restraining state officers from the performance of their official acts must pass a "strict test" of injury. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593. To justify interference by the federal chancellor in the enforcement of state laws, the plaintiff must show "exceptional circumstances"; he must show that the exercise of the federal powers of equity is necessary to prevent "irreparable injury" both "great and immediate". These authorities are discussed at length in defendant's points and authorities supporting their motions to dismiss.

After hearing oral argument on defendants' motions to dismiss, this court entered an order dismissing the complaint on the ground that it had no jurisdictional power to decide the case because of the absence of a justiciable case [fol. 278] or controversy within the meaning of Article III of the United States Constitution. In its order dismissing the action, this court made it clear that it had no authority whatsoever to take jurisdiction in the case, and could not therefore rule on defendants' motions to dismiss. The court stated: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." 169 F. Supp. 774, 776.

There is a fundamental difference between the foundation of this court's order of dismissal and the grounds for defendants' motions to dismiss. This court held that it had no jurisdictional power to decide the case. Defendants in their motions to dismiss argued, in essence, that this court should not, as a matter of discretion, exercise its jurisdictional power because plaintiffs had not suffered sufficient economic injury from the California statute under attack. In their brief to the United States Supreme Court, defendants pointed out this distinction. They noted that the issue before the Supreme Court was whether there was a justiciable controversy which gave the district court jurisdictional power over the case. Since the district court did not rule on defendants' motions to dismiss, the issues raised by those motions were not before the Supreme Court. Those issues could not be reached by the District Court because it had decided that it lacked basic jurisdictional power over the case.

The Supreme Court carefully observed this distinction in its opinion. It held that there was a justiciable controversy, but was careful not to pass judgmen on issues that had not yet been decided by the District Court and therefore not properly before the Supreme Court. The Court held that the allegations of the complaint were sufficient to [fol. 279] show that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime and Avocado Growers* v. *Jacobson*, 362 U.S. 73, 85-86. Note that the Court carefully refrained from stating whether plaintiffs were entitled to equitable relief. In the absence of a right to equitable relief, plaintiffs may have a right to determination on the merits by a normal one-judge district court, but have no right to a trial on the merits before an extraordinary three-judge court, 28 U.S.C. 2281; 2284; *cf. Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241.

In short, the questions raised by defendants' motions to dismiss have never been adjudicated. Defendants reiterate that plaintiffs have completely failed to make a showing of "irreparable injury" both "great and immediate". They have shown only that a very small percentage of all avocados shipped to California have failed to meet the statute in question; the vast majority of avocados shipped by plaintiffs to California have passed California's avocado maturity statute and have been marketed freely on California markets. The injury to plaintiffs resulting from the rejection of a few shipments is *de minimus.*

Plaintiff Florida Lime and Avocado Growers, Inc., was incorporated in Florida April 6, 1956. Dep. Tr. 249; Stipulation of Counsel, on file herein. It is engaged in the business of marketing limes, mangos, tomatoes, potatoes and avocados. Dep. Tr. 249. The corporation has made sales of avocados in 47 states, including California. Dep. Tr. 252. Plaintiff South Florida Growers, Inc., was incorporated in Florida April 29, 1953, and is engaged in the business of [fol. 280] marketing limes, mangos, and avocados. Dep. Tr. 159-160; Stipulation of Counsel, on file herein. Avocados are marketed in 47 states, including California. Dep. Tr. 189.

Plaintiffs' business operations are reflected in the following chart which compares their gross sales, avocado gross sales, and California avocado sales for the listed marketing seasons: Defendants' Exhibits A, B, C, and D in evidence.

South Florida Growers Association, Inc.,
Incorporated in Florida, April 29, 1953.
Stipulation of Counsel, on file herein.

	March 31, 1954 March 31, 1955	March 31, 1955 March 31, 1956	March 31, 1956 March 31, 1957
Gross Sales	$1,476,353.07	$1,660,492.97	$1,718,098.70
Avocado Gr. Sales	$ 820,068.00	$ 993,409.00	$1,006,241.00
Calif. Avoc. Sales	$ 78,905.31	$ 129,543.11	$ 15,065.68
	March 31, 1957 March 31, 1958	March 31, 1958 March 31, 1959	March 31, 1959 March 31, 1960
Gross Sales	$1,293,445.68	$ 708,850.61	$ 994,421.41
Avocado Gr. Sales	$ 974,201.75	$ 524,514.55	$ 581,288.21
Calif. Avoc. Sales	$ 12,973.78	$ 0.00	$ 0.00

Florida Lime and Avocado Growers, Inc.,
Incorporated in Florida, April 6, 1956.
Stipulation of Counsel, on file herein.

	April 6, 1956 March 31, 1957	March 31, 1957 March 31, 1958
Gross Sales	$546,737.85	$723,649.67
Avocado Gross Sales	$233,358.46	$209,958.09
Calif. Avocado Sales	$ 26,332.53	$ 16,893.34
	March 31, 1958 March 31, 1959	March 31, 1959 March 31, 1960
Gross Sales	$336,214.10	$715,667.68
Avocado Gross Sales	$ 80,428.08	$247,599.22
Calif. Avocado Sales	$ 0.00	$ 0.00

[fol. 281] Plaintiff South Florida Grower, Inc., commenced marketing avocados in California during the 1954-1955 season. Dep. Tr. 183, 190. Plaintiff Florida Lime and Avocado Growers, Inc., commenced the marketing of avocados in California in the 1956-1957 season. Dep. Tr. 249-250, 261. During plaintiffs' operations in California, 96.35% of all avocados shipped by plaintiffs to California have passed the 8% oil test of maturity and were freely marketed in California. Plaintiffs' Exhibits for identification, 17, 19, 20, 21 and S. Tr. 29.

In November of 1957, plaintiff Florida Lime and Avocado Growers, Inc., had 361 lugs of its avocados tested for oil content at Los Angeles, California. Plaintiffs' Exhibit 21 for identification. Being found to have less than 8% oil content, the avocados were reshipped by this plaintiff to Phoenix, Arizona. No loss is claimed on this transaction. Plaintffs' Exhibit 21 for identification. These 361 lugs represented only .036% of the total of 9,971 lugs shipped to California during the 1957-1958 shipping season. Plaintiffs' Exhibit S for identification. No other shipments are listed by this plaintiff corporation which encountered marketing difficulties in California.

Plaintiff South Florida Growers Association, Inc., shows that during the 1954 to 1957 marketing seasons 641 bushels of avocados were determined by California authorities to be out of conformity with the 8% oil standard. Plaintiffs' Exhibits 17 and 19 for identification. This figure of 641 bushels represents only 1.84% of the total of 34,905 marketed by this plaintiff in California during this period. Plaintiffs' Exhibit 19 for identification. This plaintiff shows a reduction in gross income on noncomplying fruit transshipped from California as follows: 1954-1955, $554.33, [fol. 282] representing 0.7% of this plaintiff's California sales; 1955-1956, $210.62, representing .16% of this plaintiff's California sales; and 1956-1957, $821.62, representing 5.4% of this plaintiff's California sales. Plaintiffs' Exhibit 17 for identification; Defendants' exhibits A, B, C, and D in evidence.

Neither plaintiff has made shipments of avocados for sale in California in either the 1958-1959 marketing seasons.

nor in the 1959-1960 marketing seasons. Defendants' Exhibits A, B, C, and D in evidence.

To permit plaintiffs on this record to have a three-judge federal district court decide the constitutional issues, with the burden that this procedure places upon the federal judicial system, would make a mockery of cases such as *Spielman Motor Co.* v. *Dodge, supra,* 295 U.S. 89, and *Douglas* v. *Jeannette, supra,* 319 U.S. 157. The fact that the case has already been tried is no reason to relax the important rule announced in these cases. Compare *Spielman Motor Co.* v. *Dodge, supra,* 295 U.S. 89.

[fol. 283] **Conclusion**

For the reason stated, it is respectfully submitted that the court should dismiss the plaintiffs' complaint or, in the alternative, enter judgment for defendants.

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, Attorneys for Defendants.

[fol. 284] EXHIBIT A TO REPLY BRIEF

3 California Administrative Code

Omitted. Printed side folio 86, page 81 supra.

[fol. 285]

EXHIBIT B TO REPLY BRIEF

REPRINT FROM
THE BULLETIN
DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA

VOL. XLIV JANUARY-FEBRUARY-MARCH, 1955 NUMBER 1

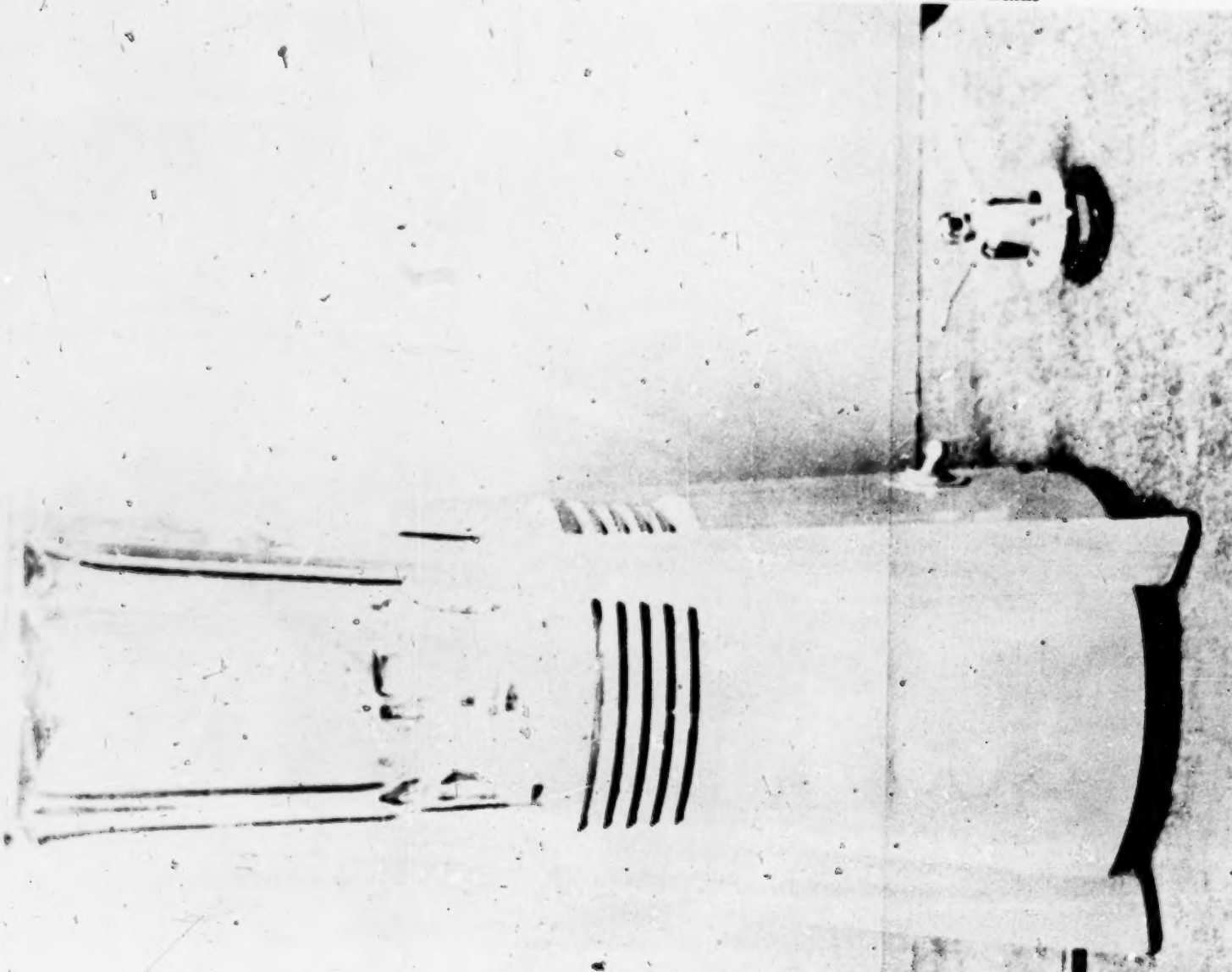
OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

Omitted. Printed side folio 99, page 93 ante.

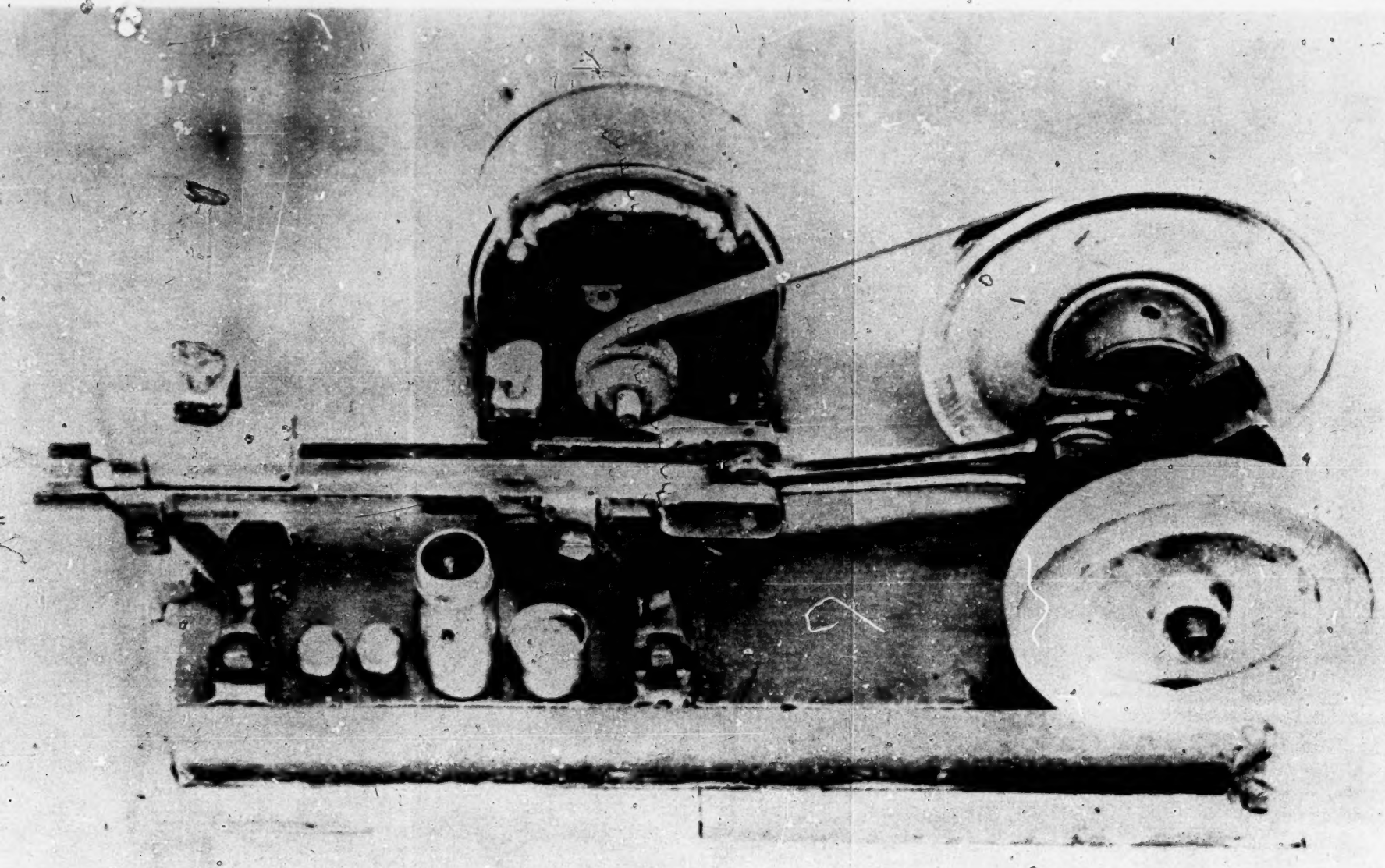
[fol. 290]

EXHIBIT C TO TRIAL BRIEF



[fol. 291]

EXHIBIT D TO TRIAL BRIEF



This certifies that the attached report of Chemical Analysis dated December 11, 1958, is the original and official report of the Bureau of Chemistry, State of California.

R Z Rollins

Robert Z. Rollins, Chief
Bureau of Chemistry

Subscribed and sworn to before me this 14th day of April, 1961.

Anne Marie Muir

Notary Public in and for the County of Sacramento, State of California.
My Commission Expires February 25, 1964

[fol. 292]

EXHIBIT E TO TRIAL BRIEF

~~(EXHIBIT E)~~

292

No Fee. Information for guidance of sender in his official duties.

STATE OF CALIFORNIA
DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
SACRAMENTO 14

To: Mr. Harold Poulsen, Chief (2) Date December 11, 1958
Bureau of Fruit and Vegetable Standardization
1220 N Street
Sacramento, California

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

Information Sample No. 14533-14548 Received December 8, 1958

Sender's description of sample Kendall brand Lula variety avocados packed by South Florida Growers Assn., Inc., Goulds, Florida. Comparative analyses for oil content made by two procedures on the same fruit. Size 16.

HSS, FID 3-120 RESULTS OF EXAMINATION

See attached sheet

RECEIVED

Address correspondence to:
STATE DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
1220 N Street
Sacramento 14, California

BUREAU OF CHEMISTRY
By J. B. LaClair

(Exhibit E)

293

[fol. 293]

752

79715 8-58 750 THIP © SPO

FOUND
OIL, PER CENT

Information No.	Florida Blendor Method of Harkness (1)	California Ball-Grinder Method (Official) (2)	Difference
14533	6.6	10.2	3.6
14534	5.9	10.0	4.1
14535	5.8	9.8	4.0
14536	7.2	11.0	3.8
14537	6.4	10.4	4.0
14538	6.7	10.6	3.9
14539	6.5	9.3	2.8
14540	6.8	10.4	3.6
14541	6.1	9.3	3.2
14542	5.8	8.7	2.9
14543	5.7	8.5	2.8
14544	6.5	9.8	3.3
14545	8.6	12.6	4.0
14546	9.1	12.6	3.5
14547	7.5	10.5	3.0
14548	8.9	11.1	2.2
		Average difference	3.4

(1) Five grams avocado, 5 ml. Halowax, 200ml. water, blended 10 minutes in Waring Blendor.

(2) Five grams avocado, 5 ml. Halowax, ground 15 minutes.

RECEIVED
DEC 13 1928
DEPARTMENT OF AGRICULTURE
NOTICE: THIS MATERIAL MAY BE PROTECTED BY COPYRIGHT LAW (TITLE 17 U.S. CODE)

This certifies that the attached report of Chemical Analysis dated November 20, 1958, is the original and official report of the Bureau of Chemistry, State of California.

Robert Z. Rollins, Chief
Bureau of Chemistry

Subscribed and sworn to before me this 14th day of April, 1961.

Notary Public in and for the County of Sacramento, State of California.

My Commission Expires February 25, 1964

(EXHIBIT E)

No Fee. Information for guidance of sender in his official duties.

STATE OF CALIFORNIA
DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
SACRAMENTO 14

RECEIVED
NOV 20 1958
DEPARTMENT OF AGRICULTURE
FRUIT AND VEGETABLE STANDARDIZATION

To: Mr. Harold W. Poulsen, Chief
Bureau of Fruit and Vegetable
Standardization
1220 N Street
Sacramento, California

Date November 20, 1958

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

Information Sample No. 14476-91 Received November 17, 1958

Sender's description of sample Lula avocados shipped by George Norris, 5731 Northwest Second Street, Miami, Florida to Mr. Whipple, to be tested for comparison of California State Method and Harkness Blendor Method of oil determination. Both tests on same fruit.

RESULTS OF EXAMINATION

Inf. No.	Found Oil, Per Cent(1) Method A(2)	Method B(3)	Inf. No.	Found Oil, Per Cent Method A	Method B
14476	7.0	11.0	14484	4.8	6.0
14477	7.1	10.6	14485	4.9	6.7
14478	6.5	9.3	14486	5.0	6.8
14479	6.4	10.2	14487	5.8	8.4
14480	7.3	10.1	14488	5.7	6.5
14481	5.7	8.2	14489	7.6	9.0
14482	6.4	9.2	14490	6.1	7.3
14483	7.5	11.6	14491	11.0	12.1

(1) Alternate eighths taken longitudinally tested by Method A - Harkness, Blendor Method, and Method B - California Ball-Grinder Method.

(2) Five gram sample, 5 ml Halowax oil, 200 ml. water, blended 10 minutes.

(3) Five gram sample, 5 ml Halowax oil, ground 15 minutes.

[fol. 296]

1220 N Street
Sacramento, California

REPORT TO SENDER ON INFORMATION SAMPLE AS RECEIVED

Following are the results of analysis of a sample or samples as received from you by this laboratory:

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14479	6.4	10.2	14487	5.8	8.4
14480	7.3	10.1	14488	5.7	6.5
14481	5.7	8.2	14489	7.6	9.0
14482	6.4	9.2	14490	6.1	7.3
14483	7.5	11.6	14491	11.0	12.1

(1) Alternate eighths taken longitudinally tested by Method A - Harkness, Blendor Method, and Method B - California Ball-Grinder Method.

(2) Five gram sample, 5 ml Halowax oil, 200 ml. water, blended 10 minutes.

(3) Five gram sample, 5 ml Halowax oil, ground 15 minutes.

[fol. 296]

Address correspondence to:
STATE DEPARTMENT OF AGRICULTURE
BUREAU OF CHEMISTRY
1220 N Street
Sacramento 14, California

BUREAU OF CHEMISTRY

By A J Bingham

(Exhibit E)

296

755

Results of Tests Made on 32 Florida Avocados by State of California Bureau of Chemistry.
(Explanation of Methods Shown on Official Report)

FOUND OIL. PERCENT

Date Tested	A Harkness Waring Blendor Method	B California Ball Grinder Method	Difference Between Methods A and B	Percent of Difference In Found Oil Between Method A and B
11-17-58	7.0	11.0	4.0	36.4
	7.1	10.6	3.5	33.0
	6.5	9.3	2.8	30.3
	6.4	10.2	3.8	37.2
	7.3	10.1	2.8	27.7
	5.7	8.2	2.5	30.4
	6.4	9.2	2.8	30.4
	7.5	11.6	4.1*	35.3
	4.8	6.0	1.2	20.0
	4.9	6.7	1.8	26.8
	5.0	6.8	1.8	26.4
	5.8	8.4	2.6	30.9
	5.7	6.5	.8*	12.1
	7.6	9.0	1.4	15.5
	6.1	7.3	1.2	16.4
	11.0	12.1	1.1	9.9**
12-8-58	6.6	10.2	3.6	35.9
	5.9	10.0	4.1	41.0**
	5.8	9.8	4.0	40.8
	7.2	11.0	3.8	34.5
	6.4	10.4	4.0	38.4
	6.7	10.6	3.9	36.7
	6.5	9.3	2.8	30.0
	6.8	10.4	3.6	34.6
	6.1	9.3	3.2	34.4
	5.8	8.7	2.9	33.3
	5.7	8.5	2.8	32.9
	6.5	9.8	3.3	33.6
	8.6	12.6	4.0	31.7
	9.1	12.6	3.5	27.7
	7.5	10.5	3.0	28.5
	8.9	11.1	2.2	19.8
		Arithmetical Average	2.9	

EXHIBIT F TO TRIAL BRIEF

* Denotes high and low differences in found oil content by comparing Methods A and B.

** Denotes high and low variations in percent of found oil content in comparing Methods A and B.

Date Tested	Waring Blendor Method	Shell Grinder Method	Between Methods A and B	In Found Oil Between Method A and B
11-17-58	7.0	11.0	4.0	36.4
	7.1	10.6	3.5	33.0
	6.5	9.3	2.8	30.3
	6.4	10.2	3.8	37.2
	7.3	10.1	2.8	27.7
	5.7	8.2	2.5	30.4
	6.4	9.2	2.8	30.4
	7.5	11.6	4.1*	35.3
	4.8	6.0	1.2	20.0
	4.9	6.7	1.8	26.8
	5.0	6.8	1.8	26.4
	5.8	8.4	2.6	30.9
	5.7	6.5	.8*	12.1
	7.6	9.0	1.4	15.5
	6.1	7.3	1.2	16.4
	11.0	12.1	1.1	9.9**
12-8-58	6.6	10.2	3.6	35.9
	5.9	10.0	4.1	41.0**
	5.8	9.8	4.0	40.8
	7.2	11.0	3.8	34.5
	6.4	10.4	4.0	38.4
	6.7	10.6	3.9	36.7
	6.5	9.3	2.8	30.0
	6.8	10.4	3.6	34.6
	6.1	9.3	3.2	34.4
	5.8	8.7	2.9	33.3
	5.7	8.5	2.8	32.9
	6.5	9.8	3.3	33.6
	8.6	12.6	4.0	31.7
	9.1	12.6	3.5	27.7
	7.5	10.5	3.0	28.5
	8.9	11.1	2.2	19.8
		Arithmetical Average	2.9	

EXHIBIT F TO TRIAL BRIEF

* Denotes high and low differences in found oil content by comparing Methods A and B.

** Denotes high and low variations in percent of found oil content in comparing Methods A and B.

(EXHIBIT F) 277.

[fol. 298] Affidavit of Service by Mail (omitted in printing).

[fol. 299] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

MEMORANDUM AND ORDER—July 10, 1961

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal Protection Clauses [fol. 300] of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U.S.C. §601 *et seq.*) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states.

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[1] The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25(d)).

California has a law (California Agricultural Code, §792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This Court initially dismissed the action for want of a present, actual case or controversy (*Florida Lime & Avocado Growers* vs. *Jacobsen*, 169 F. Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (*Florida Lime & Avocado Growers* vs. *Jacobsen*, 362 U.S. 73).

The case has now been heard by a three-judge Court, pursuant to the provisions of Title 28 U.S.C. §§2281 and 2284. The evidence has been heard, with the ruling on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the Court for its determination.

The Court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the Court has reserved its ruling. The exhibits and depositions [fol. 301] are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification.[2]

The Facts

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties.

[2] It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See: pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

Florida grows principally avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this State contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil con- [fol. 302] tent of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant after-taste. If they are picked when mature, they ripen while softening, and became palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which

[3] Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the [fol. 303] fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

[fol. 304] Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be

acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not *per se* [fol. 305] bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste.[4] Defendants offered testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the

[4] It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit. (That is, the test might be made only on fruit which had given physical indications during softening that it was mature.)

percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this Court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

Equitable Jurisdiction

A Court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction sus- [fol. 306] pending the enforcement of the laws of the State of California.[5] If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: *Watson* vs. *Buck*, 313 U.S. 387; *A.F. of L.* vs. *Watson*, 327 U.S. 582).

If the Court were required to take equitable jurisdiction of the instant case, coming before this Court for the first time, it might well be advisable for the Court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California Courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento.[6] (See: *A.F. of L.* vs. *Watson, supra.*)

This case is now before this Court, however, with a mandate from the United States Supreme Court, directing this Court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This Court concludes, therefore, that in the instant case this Court has no dis-

[5] For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of *Florida Lime & Avocado Growers* vs. *Jacobsen, supra*, at 362 U.S. 77.

[6] Case No. 125826, in the records of that Court.

cretion to decline equitable jurisdiction or to retain jurisdiction while awaiting State Court decision.

[fol. 307] The Merits of the Controversy

In the remainder of this opinion, we will consider, first, the Constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with Federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C.J.S. pp. 713-714; *O'Brien* vs. *Equitable Society*, 212 F.2d 383; and See: *United States* vs. *Denver & R. G. Ry. Co.*, 191 U.S. 84; *Northern P. Ry. Co.* vs. *Lewis*, 162 U.S. 366; and *Morse* vs. *Fields*, 127 F.Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (*Williamson* vs. *Lee Optical Co.*, 348 U.S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the light of which the enactment is reasonable, then it is for the Legislature, not this Court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

Constitutionality of the California Law

A. Equal Protection

Plaintiffs contend that the California 8% oil content [fol. 308] test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: *Phillips Chemical Co.* vs. *Dumas School District*, 361 U.S. 376). It is not enough

that a classification by State law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (*Allied Stores of Ohio* vs. *Bowers*, 358 U.S. 522 and *Borden's Co.* vs. *Ten Eyck*, 297 U.S. 251). It is for the Legislature, not the Courts, to write the laws. The people, if the Legislature commits abuses, have their remedy at the polls (*Williamson* vs. *Lee Optical Co., supra*).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity. The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California Legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable support for the [fol. 309] decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (*St. John* vs. *New York*, 201 U.S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: *St. John* vs. *New York, supra*). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all

avocados sold for human consumption. The general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable.[7]

Granting the possibility of a better law than the one devised by the California Legislative authorities, that does [fol. 310] not require a finding that the law which *has* been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the State in interstate commerce (See: *Milk Board* vs. *Eisenberg Co.*, 306 U.S. 346; *Simpson* vs. *Shepard*, 230 U.S. 352). It is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (*Simpson* vs. *Shepard, supra; Mintz* vs. *Baldwin*, 289 U.S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (*Huron Cement Co.* vs. *Detroit*, 362 U.S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the

[7] The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the Nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

[fol. 311] 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of *de minimis non curat lex.*

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this State of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this State have been marketed successfully after passing the California test.

Looking at the testimony of plaintiffs' witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they [fol. 312] reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatment, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil requirement is not unconstitutional.

Alleged Conflict Between State and Federal Law

The remaining question for the Court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The Federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The Federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states, if they comply with the shipping dates established by the Federal Order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U.S.C. §121).

[fol. 313] The Federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69, or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any Federal law or order. For all that the Federal law declares, avocados grown in any state but Florida may be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with Federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

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[8] At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the Federal Order. If the implication of Federal pre-emption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication [fol. 314] should not lightly be made (*Cloverleaf Co.* vs. *Patterson*, 315 U.S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide field for the protection of consumers by the states by the appropriate exercise of the state police power (See: *Reid* vs. *Colorado*, 187 U.S. 137). The case would be different if the Federal Government had established a complete and uniform regulatory scheme which covered the whole problem (See: *Oreg.-Washington Co.* vs. *Washington*, 270 U.S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of *Mintz* vs. *Baldwin, supra*. In that case, the granting of a Federal certificate would have prevented the application of state inspection requirements, only because the Federal law there interpreted expressly so stated.

In *Cloverleaf Co.* vs. *Patterson, supra*, it was declared that where a Federal statute does not in specific terms prohibit state action, it must be clear that the Federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the Federal Government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this Court would be required to overrule *Cloverleaf Co.* vs. *Patterson, supra*. This, the Court has neither [fol. 315] the power nor the inclination to do.

Both the State and the Federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority

against seeking out conflict between state and Federal regulation, unless such conflict clearly exists (*Huron Cement Co.* vs. *Detroit, supra*).

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any Federal law or regulation.

It Is, Therefore, Ordered that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

And It Is Further Ordered that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the Clerk of this Court pursuant to the applicable rules and statutes.

Dated: July 10th, 1961.

Homer T. Bone, Senior Judge, United States Court of Appeals for the Ninth Circuit.

Louis Goodman, Chief Judge, United States District Court for the Northern District of California.

Sherrill Halbert, United States District Judge.

[fol. 316] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS ON EVIDENCE AND JUDGMENT ORDER—Filed August 4, 1961

I.

Objections to proposed findings of fact

Proposed finding No. 1: Fails to state that plaintiff Florida Lime and Avocado Growers, Inc., incorporated as a corporation for profit April 6, 1956, is the continuation of the same business previously conducted as a cooperative.

Proposed finding No. 4: There is no basis in the evidence for impliedly imputing to plaintiffs a temptation to pick and market avocados in an immature state; also, it is misleading to suggest that there is a universal growing season for all avocados, no matter of what varieties or where grown.

[fol. 317] *Proposed finding No. 5*: There is no substantial evidence to support the statement that oil content is the best available index of the maturity of avocados, if intended to apply to the Florida-grown avocados handled by plaintiffs.

Proposed finding No. 6: There is no substantial evidence to support the proposed finding that a standard requiring a minimum of 8% of oil in an avocado before it is marketed is scientifically valid as a criterion of maturity or quality of the hybrid and Guatemalan varieties of avocados grown in Florida.

Proposed finding No. 8: There is no substantial evidence that the West Indian varieties of avocados grown in Flor-

ida are of declining commercial importance, nor evidence that the lower volume of Florida shipments of West Indian avocados in the 1959-60 season as compared with the 1955-56 season was attributable to declining commercial importance of these avocados rather than to the difference in the growing and marketing conditions prevailing in the two seasons.

Proposed finding No. 9: Comparison of the volume of shipments of hybrid and Guatemalan varieties of avocados made from Florida in the 1959-60 season, as against the volume of shipments of West Indian varieties of avocados made in this particular season, with no evidence whatever of the growing conditions affecting the production of the different varieties in this particular season, does not warrant the conclusion that the hybrid and Guatemalan varieties are of relatively increasing commercial importance in comparison with the West Indian varieties.

Proposed finding No. 10: There is no substantial evidence that under present-day methods and facilities of transportation and storage it would not be commercially feasible to market in California West Indian varieties of avocados grown in Florida if not debarred by the California 8% oil content requirement.

[fol. 318] *Proposed finding No. 11*: The effect of the California 8% oil content in application to avocados grown in California is not a matter within the issues of this case; the proposed finding, in application to the hybrid and Guatemalan varieties of avocados grown in Florida, as well as the West Indian varieties, is contrary to the overwhelming evidence that the California 8% oil content requirement impedes or debars the marketing of these varieties in this state after they have attained maturity, even though they have not also attained 8% oil content.

Proposed finding No. 12: In the absence of any evidence whatever regarding the conditions affecting the growing and marketing of Florida avocados in the years 1959, 1960 and 1961, the fact that the plaintiffs did not market or attempt to market any avocados in California during these years is immaterial to the issues of this case.

Proposed finding No. 13: Contrary to the conclusion stated in this proposed finding, the evidence shows abundantly that the plaintiffs have suffered irreparable injury because of the California embargo against sale in this state of mature and wholesome Florida avocados with less than 8% oil content.

II.

Objections to proposed conclusions of law

Proposed conclusions Nos. 3, 4, 5, 6 and 7: The plaintiffs object to these proposed conclusions of law, or of mixed law and fact, as contrary to the evidence and the law applicable thereto.

III.

Objections to proposed rulings on evidence

1. The court has already ordered the substitution of Charles Paul as defendant in place of William E. Warne, as indicated by the amended title of the case in the court's memorandum and order filed July 12, 1961 and the footnote on page 1 thereof.

[fol. 319] 2 and 3. There is no basis in the record for the assertion that all of plaintiffs' depositions and exhibits were either submitted to the court as an "offer of proof," or received or considered by the court as an offer or offers of proof. Instead, the record shows that said depositions and exhibits were offered and received in evidence, with leave to the defendants to submit objections thereto, such objections to be passed upon by the court if deemed necessary. (Tr. 191: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary.") Thereupon, in its order and memorandum of July 12, 1961, the court declared that a ruling or rulings on defendants' objections to the admissibility of plaintiffs' evidence, in whole or in part, was deemed unnecessary.

4. A reservation of right to the defendants to introduce certain evidence upon a further hearing of the case, in the

event of a remand of the case for further hearing by the court to which an appeal is taken from the judgment of this court, would be a procedural anomaly.

5. There is no occasion to enter an order at this time receiving into evidence exhibits offered by the defendants upon the trial of the case and then admitted without objection.

Wherefore the plaintiffs submit that no orders or rulings should be made by the court as requested by the defendants in the document entitled "Order *re* plaintiffs' motion to substitute and ruling on evidentiary matters."

Respectfully submitted,

Isaac E. Ferguson, Attorney for plaintiffs.

[fol. 320] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS—Filed August 7, 1961

Findings of Fact

1. Proposed Finding No. 1:

This finding is based on the stipulation of counsel, filed with the Court on April 26, 1961.

2. Proposed Finding No. 4:

This finding follows the memorandum opinion of the Court page 4, and is supported in the transcript of testimony pages 162-163.

3. Proposed Finding No. 5:

This finding that oil is the best available index of maturity for avocados follows the memorandum opinion of the Court [fol. 321] page 7, and is supported by the transcript of testimony pages 65, 108, 136.

4. Proposed Finding No. 6:

The finding that a standard requiring a minimum of 8% in oil in an avocado is scientifically valid as applied to hybrid and Guatemalan varieties follows the memorandum opinion of the Court, pages 6 and 7, and is supported by the transcript of testimony pages 46, 137, 164.

5. Proposed Finding No. 8:

The finding that the West Indian varieties of avocados grown in Florida are of declining importance is based on the record of commercial shipments by volume and variety set forth in defendants' exhibit E (admitted into evidence, Tr. 130).

6. Proposed Finding No. 9:

The finding that the hybrid and Guatemalan varieties are of increasing commercial importance is based on the record of commercial shipments by volume and variety set forth in defendants' exhibit E (admitted in evidence, Tr. 130).

7. Proposed Finding No. 10:

The finding follows the memorandum opinion of the Court, page 13, and is supported by the transcript of testimony pages 164-165; 177-179.

8. Proposed Finding No. 11:

The finding follows the memorandum opinion of the Court pages 10 and 11, and is supported by the transcript of testimony pages 111-112, 158, 164.

9. Proposed Finding No. 12:

The finding is supported by the plaintiffs' answers to interrogatories set forth in defendants' exhibits A, B, C, D (admitted in evidence, Tr. 129). The finding is relevant [fol. 322] to show the absence of injury to plaintiffs.

10. Proposed Finding No. 13:

The finding follows the memorandum opinion of the Court, pages 6 and 13, and is supported by the absence of proof by plaintiffs of injury.

Order Re Motion to Substitute and Ruling on Evidentiary Matters

1. The proposed order substituting Charles Paul in the place of William E. Warne as a party defendant follows the direction of the Court to prepare "all other documents necessary for the full and complete disposition of the case . . . . " Memorandum Opinion herein, filed July 12, 1961, pages 1 and 17.

2. The proposed order that the depositions of Biggars, Harkness, Kendall, Piowaty and Wimbish, and the exhibits attached thereto were considered by the Court as an offer of proof follows the memorandum opinion of the Court, page 3, which held these documents admissible *arguendo* only. Plaintiffs' rights are fully protected since the contents of the depositions and exhibits, as offers of proof, will be available for review by an appellate court.

At the trial plaintiffs offered into evidence in their entirety (and without reading) the 305 page transcript of depositions taken earlier in Florida, together with the voluminous exhibits attached thereto. Tr. 29. Defendants promptly objected to their admission in evidence and requested that they be read in order that appropriate objection could be entered statement by statement and witness by witness. Tr. 29. The Court thereupon reserved ruling on their admissibility pending the filing of defendants' detailed objections. Tr. 29, 103, 190-191. During the course of the proceedings thereafter the Court treated these depo-

[fol. 323] sitions and exhibits as having constituted an offer of proof

> "They have been *offered* in evidence but we have reserved the ruling on them." Tr. 103. (emphasis added)
>
> ". . . we may dispose of this case without any need of acting upon objections to the depositions. We are not going to consider that unless it is necessary. If it is necessary then we will have to have another hearing." Tr. 190.

The latter statement "They are all in evidence subject to your objections . . . . " (Tr. 191) when considered in the light of the earlier statements show that the question of the admissibility of the depositions and exhibits was reserved for later decision of the Court.

As noted above, the Court considered the contents of the depositions and exhibits as an offer of proof. Finding the offer of proof lacking in solidity, the Court had no need to reconvene to consider their admissibility under the rules of evidence.

The alternative proposed by plaintiffs is untenable. The admission of these depositions and exhibits into evidence, without the hearing of defendants' evidentiary objections, and without affording the defendants opportunity to adduce rebutting evidence, would be error. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.*, 9 Cir., 264 F.2d 199 (1959).

Dated:

Respectfully submitted,

Stanley Mosk, Attorney General, State of California,
John Fourt, Deputy Attorney General, State of California.

[fol. 324] Affidavit of Service by mail (omitted in printing).

[fol. 325] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER OVERRULING PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RULINGS ON EVIDENCE, AND JUDGMENT ORDER—September 20, 1961

Plaintiffs' objections to the defendants' proposed findings of fact, conclusions of law, rulings on evidence and judgment order, and the memoranda submitted in connection with said objections, have been duly considered by the Court and found to be without merit.

It Is, Therefore, Ordered that plaintiffs' objections to [fol. 326] defendants' proposed findings of fact, conclusions of law, rulings on evidence and judgment order be, and the same are, hereby overruled.

Dated: September 20, 1961.

Homer T. Bone, Senior Judge, United States Court of Appeals for the Ninth Circuit; * *See Note Below*, Chief Judge, United States District Court for the Northern District of California; Sherrill Halbert, United States District Judge, Northern District of California.

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[fol. 327] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
September 20, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

[fol. 328] Findings of Fact

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney

General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it [fol. 329] can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is ef- [fol. 330] fective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

Conclusions of Law

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plain-

tiffs' application for such an injunction was properly heard before this three judge court under 28 U.S.C. 2281.

2. The Court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this Court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avoca- [fol. 331] dos grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby Ordered to be entered accordingly.

Dated: September 20, 1961.

Homer T. Bone, United States Circuit Judge; * *See Note Below*, United States District Judge; Sherrill Halbert, United States District Judge.

Disapproved and objections submitted.

Isaac E. Ferguson, Attorney for plaintiffs.

---

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign these Findings of Fact and Conclusions of Law.

[fol. 332] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER RE PLAINTIFFS' MOTION TO SUBSTITUTE AND RULING ON EVIDENTIARY MATTERS—Filed September 21, 1961

The above entitled action came on for trial on February 7 and 8, 1961, on the application of plaintiffs for permanent injunction, and the Court having reserved ruling on certain motions and evidentiary matters at the trial pending the filing of written argument of the parties, and written argument having been duly filed and considered by the Court, and the Court being fully advised, now therefore it is Ordered:

1. Charles Paul, Director of Agriculture of the State [fol. 333] of California, is substituted as a party defendant in the place of William E. Warne;

2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;

3. Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;

4. The Court reserves to defendants the right to introduce rebutting evidence at a further hearing should it be determined upon appeal and remand that the plaintiffs' offer of proof described in paragraphs 2 and 3 herein should have been admitted into evidence;

5. Defendants' exhibits A, B, C, D, E and F are admitted into evidence, plaintiffs having raised no objection thereto.

Dated: September 20, 1961

Homer T. Bone, United States Circuit Judge; * *See Note Below*, United States District Judge; Sherrill Halbert, United States District Judge.

Disapproved and objections submitted.

Isaac E. Ferguson, Attorney for Plaintiffs.

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* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[fol. 334] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation, Plaintiffs,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; Edmund G. Brown, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California, Defendants.

JUDGMENT—Entered September 22, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed herein its written

findings of fact and conclusions of law and being fully advised, it is Ordered:

1. Plaintiffs take nothing;

[fol. 335] 2. Plaintiffs' request for permanent injunction is denied;

3. The action is dismissed on the merits;

4. Defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Dated: September 20, 1961.

Homer T. Bone, United States Circuit Judge; * *See Note Below,* United States District Judge; Sherrill Halbert, United States District Judge.

Entered in Civil Docket Sept. 22, 1961.

Disapproved.

Isaac E. Ferguson, Attorney for plaintiffs.

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* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Judgment.

[fol. 339] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

ORDER THAT CERTAIN ORIGINAL RECORDS BE INCLUDED IN APPEAL RECORD—October 3, 1961

It is hereby ordered, upon stipulation of counsel for the respective parties in the above-entitled cause, that upon the filing herein within the time permitted by law of a notice of appeal to the Supreme Court of the United States

from the judgment entered herein on September 22, 1961, and upon designation by the parties of the documents and papers to be included in the record on such appeal, that the clerk of this court shall transmit to the clerk of the United States Supreme Court as part of such record the originals, in lieu of copies, of all depositions and exhibits that may be designated by the parties.

Dated: October 3, 1961.

Sherrill Halbert, United States District Judge.

[fol. 340] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil action No. 7648

[Title omitted]

ANSWER OF CHARLES PAUL—Filed October 4, 1961

Comes now Charles Paul, Director of Agriculture, State of California, and with leave of court files his answer to plaintiffs' complaint as amended, and for cause of defense alleges as follows:

First Defense

That this answering defendant admits the allegations contained in paragraphs II, V, VIII, XI, XVII, XVIII, XIX, XX, and XXI of plaintiffs' complaint; that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, VI, VII, IX, X, XII, XIII, XIV, XV, XXII, XXIV(a), XXV and XXVII of plaintiffs' complaint and [fol. 341] on said ground denies the truth of each and every allegation contained in said paragraphs; that this answering defendant denies the truth of each and every allegation contained in paragraphs III, IV, XVI, XXIII, XXIV(b), XXVI, XXVIII, XXIX, XXX, XXXI and XXXII of plaintiffs' said complaint.

Second Defense

That plaintiffs' suit abated on January 3, 1961, the date when former defendant William E. Warne vacated the office of Director of Agriculture, State of California; that the court prejudicially erred and acted in excess of its jurisdiction in substituting this answering defendant in the place of the said William E. Warne.

Third Defense

That this court lacks jurisdiction for failure of the complaint to allege facts showing the existence of a case or controversy within Constitution, Article III.

Fourth Defense

That this court lacks jurisdiction over the subject matter set forth in the complaint.

Fifth Defense

That the complaint fails to state a case within the equity jurisdiction of the court.

Sixth Defense

That the complaint fails to state a claim against defendant upon which relief can be granted.

[fol. 342]

Seventh Defense

That the federal constitutional questions raised by the pleadings may be avoided or simplified or their posture changed if the state enactments in question are first construed by the authoritative decision of a California court; that this court should stay further proceedings pending an authoritative determination of doubtful state law in the state courts of California.

Eighth Defense

That the quality and maturity standards purportedly promulgated under Marketing Order No. 69, governing avocados grown in South Florida (19 F.R. 3439, 7 C.F.R. 969), the promulgation, and the methods and procedures used in the administration thereof, are unreasonable and arbitrary and are invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.).

Ninth Defense

That sections 784 and 792, California Agricultural Code, constitute a legitimate and proper exercise of the state police power and are intended to protect the public health by preventing the marketing of immature, unwholesome avocados which are unfit for human consumption, and to protect the general prosperity and welfare of the important California avocado industry by preventing the marketing of immature, unwholesome avocados, thus maintaining the industry reputation, and consumer and trade market demand, for mature, wholesome, nutritious avocados.

[fol. 343] Wherefore, defendant prays:

1. That the plaintiffs' said complaint be dismissed;

2. That sections 784 and 792, California Agricultural Code, be declared valid and subsisting statutes which are applicable to all avocados prepared, packed, placed, delivered for shipment, delivered for sale, loaded, shipped, transported or sold in bulk or in containers within the State of California;

3. That the defendant be granted such other relief in the premises as the court may deem just and proper;

4. That the court award to defendant his costs.

Dated: October 4, 1961

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, By John Fourt, Attorneys for Defendant. Charles Paul, Director of Agriculture, William Norris, Of Counsel.

[fol. 344] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 345] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

Civil No. 7648

[Title omitted]

NOTICE OF APPEAL—Filed October 10, 1961

Notice is hereby given that Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., the above named plaintiffs, hereby appeal to the Supreme Court of the United States from the final judgment entered September 22, 1961, that plaintiffs take nothing, denying plaintiffs' request for permanent injunction, dismissing the action on the merits, and that the defendants recover from plaintiffs their costs of action.

This appeal is taken pursuant to 28 U.S.C. section 1253.

Appellants' designation of record on appeal

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 346] Court of the United States, and include therein the following:

1. All portions of the record heretofore transmitted to the Clerk of the Supreme Court of the United States on plaintiffs' appeal (pursuant to notice of appeal filed February 12, 1959) from the judgment entered January 13, 1959.

2. Judgment of U.S. Supreme Court reversing judgment of District Court, filed April 25, 1960.

3. Motion of plaintiffs to amend and supplement complaint, etc., filed April 29, 1960.

4. Special appearance of defendants Edmund G. Brown and Stanley Mosk in opposition to plaintiffs' motion to amend complaint, filed May 5, 1960.

5. Special appearance of defendant William E. Warne in opposition to plaintiffs' motion to amend complaint, filed May 5, 1960.

6. Plaintiffs' reply to defendants' memorandum on motion to substitute parties, filed May 16, 1960.

7. Order June 6, 1960, granting plaintiffs' motion to substitute parties, filed June 6, 1960.

8. Amendment and supplement to plaintiffs' complaint, filed June 6, 1960.

9. Order granting leave to plaintiffs to amend and supplement complaint, filed June 13, 1960.

10. Amendment and supplement to plaintiffs' complaint, filed June 13, 1960.

11. Order granting leave to defendants to file answers, filed June 14, 1960.

12. Answer of defendant William E. Warne, filed June 14, 1960.

13. Answer of defendants Edmund G. Brown and Stanley Mosk, filed June 14, 1960.

14. Defendants' interrogatories to George Norris and the answers thereto, filed August 19, 1960.

15. Answers of plaintiffs to defendants' interrogatories, filed October 10, 1960.

[fol. 347] 16. Motion of plaintiffs for leave to substitute James T. Ralph as defendant in place of William E. Warne, filed January 27, 1961.

17. Motion of plaintiffs for leave to substitute Charles Paul as defendant in place of William E. Warne, filed February 6, 1961.

18. Memorandum of defendants *re* substitution of state officers, filed February 7, 1961.

19. Trial proceedings February 7 and 8, 1961, including reporter's transcript of oral testimony, plaintiffs' exhibits 23, 24, 25 and 26, and defendants' exhibits A, B, C, D, E and F (for identification).

20. Amended motion of plaintiffs for substitution of Charles Paul as defendant in place of William E. Warne, filed March 9, 1961.

21. Order March 13, 1961 correcting clerical mistake.

22. Stipulation *re* exhibits, filed April 26, 1961.

23. Special appearance of Charles Paul in opposition to plaintiffs' motion to substitute Charles Paul as defendant in place of William E. Warne, filed April 26, 1961.

24. Stipulation *re* plaintiff corporations, filed April 26, 1961.

25. Memorandum and order filed July 12, 1961.

26. Plaintiffs' objections to proposed findings, etc., filed August 4, 1961.

27. Reply to plaintiffs' objections to proposed findings, etc., filed August 7, 1961.

28. Lodged defendants' proposed findings, etc., August 10, 1961.

29. Order September 21, 1961 overruling plaintiffs' objections to proposed findings, conclusions, judgment, etc.

30. Findings of fact, conclusions of law, ruling on evidentiary matters and judgment, filed September 21, 1961.

31. Entry of judgment, September 22, 1961.

32. Order October 3, 1961 staying judgment pending appeal.

[fol. 348] 33. Order October 3, 1961 directing clerk to transmit originals of depositions and exhibits on plaintiffs' appeal.

34. Answer of Charles Paul to plaintiffs' complaint as amended, filed October 4, 1961.

35. Plaintiffs' notice of appeal and designation of record on appeal.

The questions presented by this appeal and the circumstances under which they arise.

(1)

Does not the commerce clause of the United States Constitution (Art. I, Sec. 8, clause 3), of its own force and without implementation by acts of Congress, preclude inhibition against sale in California of avocados grown in Florida and shipped in interstate commerce, on the ground that said avocados have less than the 8% oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados by their nature mature with less than 8% oil content and are not for that reason deleterious, unpalatable, or of inferior quality?

(2)

In practical effect, does not the application of Sec. 792 of the Agricultural Code of California to avocados produced in Florida and shipped for sale in California result in arbitrary discrimination against the Florida fruit, to the competitive commercial advantage of the growers and handlers of California avocados, since the avocados produced in Florida are predominantly of varieties that of their nature and conditions of growth attain maturity and maximal quality with less than 8% oil content, while the avocados produced in California are predominantly of varieties with much higher oil content, and since the lower oil content of the Florida avocados does not of itself render the fruit unpalatable or inimical to health, thus denying to the shippers of the Florida fruit the equal protection of the law commanded by the Fourteenth Amendment?

[fol. 349] (3)

In face of the supremacy clause of the United States Constitution (Art. VI, Sec. 2), may officers of the State of California debar from sale in that state avocados grown in Florida and shipped in interstate commerce in compliance with the maturity and quality regulations issued by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural

Marketing Agreement Act of 1937, by disregarding the federal certification of such avocados as of requisite maturity and quality for interstate marketing and instead subjecting such avocados to another and different determination of maturity and quality prescribed by state law?

* * * * * * *

Appellants, handlers of avocados grown in South Florida, have been frustrated in their endeavors to avail themselves of the market for their fruit in California by imposition of California's 8% oil content requirement for sale of avocados in that state. Of the 40-odd varieties of avocados produced commercially in Florida, some never attain 8% oil content, while the remaining varieties attain 8%, if ever, only long after they reach maturity and are ready to be marketed.

There is not an iota of evidence in the case that the low oil content of the Florida avocados is of itself indicative of immaturity, unpalatability or unwholesomeness, in particular the avocados shipped by appellants to California and rejected for sale in that state because of failure to pass the 8% oil test. There is abundant evidence to the contrary.

Since June 11, 1954 the avocados of which appellants are handlers have been marketed in interstate commerce under a marketing agreement and order made by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural Marketing Agreement Act of 1937. The specific purpose for which [fol. 350] this particular marketing agreement was made was to establish standards of maturity and quality to govern the interstate marketing of this fruit, thereby to promote market acceptance and to stabilize the return to the growers. Oil content is not a determinant of maturity or quality of the Florida avocados under the marketing agreement. Instead, as to each of the different varieties of the fruit, maturity is determined by attainment of specified weight (or size) at the permissible picking dates assigned for the particular variety. These picking dates vary from season to season in accordance with the growing conditions affecting the crop as a whole, or affecting particular varieties. For each variety, in each crop season, three or four successive picking dates are assigned, about

two weeks apart, and at each of these dates the avocados which have attained the specified minimum weight are permitted to be picked. At each of the permissive picking dates the minimum weight requirement is somewhat reduced, until finally the minimum weight requirement is lifted entirely.

Manifestly, the California 8% oil content requirement, as a determinant of maturity or quality of the Florida avocados shipped for sale in that state in compliance with the federal regulations, is in direct and irreconcilable conflict with the federal regulations, therefore must yield thereto.

Isaac E. Ferguson, Attorney for Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., Appellants, 13016 Victory Boulevard, North Hollywood, California.

[fol. 351] Proof of Service (omitted in printing).

[fol. 359] [File endorsement omitted]

In United States District Court
Northern District of California

Northern Division

Civil No. 7648

[Title omitted]

Notice of Cross-Appeal to the Supreme Court of the United States—Filed November 3, 1961

I. Notice is hereby given that Charles Paul, Edmund G. Brown and Stanley Mosk, defendants above-named, hereby cross-appeal to the Supreme Court of the United States as follows:

(1) From that portion of the Judgment entered herein September 22, 1961, which provides:

"3. The action is dismissed on the merits;"

This cross-appeal is taken pursuant to 28 U.S.C., section 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 360] Court of the United States, and include in said transcript the items described in defendants' cross-designation of record on appeal, filed herewith.

III. The following questions are presented on this appeal:

(1) Whether the District Court erred in dismissing the action on the merits instead of dismissing the action for want of equity jurisdiction.

(2) Whether the District Court erred in failing to dismiss the action as barred by the Eleventh Amendment to the United States Constitution.

(3) Whether appellants' evidence shows the existence of a case or controversy within Article III of the United States Constitution.

(4) Whether the District Court erred in failing to abstain from final decision pending construction of Section 792, Agricultural Code, by the California courts.

Dated: November 3, 1961.

Stanley Mosk, Attorney General of the State of California, John Fourt, Deputy Attorney General, Lawrence E. Doxsee, Deputy Attorney General, By: John Fourt.

[fol. 361] Affidavit of Service by Mail (omitted in printing).

[fol. 362]

SUPREME COURT OF THE UNITED STATES

No. 557—October Term, 1961

FLORIDA LIME AND AVOCADO GROWERS, INC., et al., Appellants,

vs.

CHARLES PAUL, Director of Department of Agriculture of California, et al.

ORDER NOTING PROBABLE JURISDICTION—January 15, 1962

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 363]

SUPREME COURT OF THE UNITED STATES

No. 599—October Term, 1961

CHARLES PAUL, Director of Department of Agriculture of California, et al., Appellants,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., et al.

ORDER NOTING PROBABLE JURISDICTION—January 15, 1962

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 557.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. [redacted] 43

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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APPELLANTS' JURISDICTIONAL STATEMENT

Isaac E. Ferguson
13016 Victory Boulevard
North Hollywood, California

Attorney for appellants.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. _____

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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APPELLANTS' JURISDICTIONAL STATEMENT

Isaac E. Ferguson
13016 Victory Boulevard
North Hollywood, California

Attorney for appellants.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. _____

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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APPELLANTS' JURISDICTIONAL STATEMENT

Opinion of District Court

The three-judge District Court, on July 12, 1961, filed a "Memorandum and Order" finding against appellants on the merits of the case and directing the appellees to prepare findings of fact and conclusions of law, also a form of

judgment to be entered in accordance with the court's memorandum and order. Findings and conclusions of law were filed September 21, 1961. Said memorandum and order, findings of fact and conclusions of law are set forth in Appendix I hereof.

Jurisdiction of the appeal

Nature of the proceeding and the statute pursuant to which it is brought: Appellants, "handlers" of avocados grown in Florida, complain of restriction against the marketing of the Florida fruit in the State of California, by application thereto of the provision of Sec. 792 of the Agricultural Code of California barring sale in that state of avocados with less than 8% oil content, and seek declaratory judgment and injunction to end further enforcement of said statute against them by the state officers of California.

This case was here before (1959 Term, No. 49) on appeal from the judgment of the District Court dismissing the action, on defendants' motion, for want of jurisdiction (169 F. S. 774). This court reversed the judgment of the District Court and held: (1) that a three-judge District Court was properly convened to hear the case, pursuant to 28 U. S. C. Sec. 2281; (2) that the judgment of the District Court was appealable directly to this court, pursuant to 28 U. S. C. Sec. 1253; (3) that the complaint and the record then before the court presented an existing dispute between the parties as to present legal rights amounting

to a justiciable controversy which appellants were entitled to have determined on the merits; (4) that substantial grounds of unconstitutionality were asserted by appellants against application to their avocados of the California 8% oil content requirement for sale of the fruit in that state, namely, violation of the commerce clause of the United States Constitution (Art. I, Sec. 8, cl. 3) and of the equal protection clause of the Fourteenth Amendment, invoked in the District Court under 28 U. S. C. 1331; (5) that there was jurisdiction of the action in the District Court also under 28 U. S. C. 1337, and jurisdiction of this court on the appeal, on appellants' claim that enforcement of California's 8% oil content requirement to bar sale in that state of the Florida avocados constitutes an impermissible conflict with the marketing of the Florida fruit under the maturity and quality regulations issued by the Secretary of Agriculture of the United States pursuant to authority vested in him by an Act of Congress regulating interstate commerce, the Agricultural Marketing Agreement Act of 1937.

Date of judgment and notice of appeal: The judgment of the District Court now sought to be reviewed was entered September 22, 1961, and notice of appeal was filed by appellants in the office of the clerk of the United States District Court for the Northern District of California, Northern Division, on October 10, 1961.

Statutory provision for appeal: The appeal is taken pursuant to 28 U. S. C. Sec. 1253.

Cases sustaining jurisdiction: In view of

the decision of this court on the previous appeal in this case (362 U. S. 73, 80 S. Ct. 568), further citation of cases sustaining jurisdiction of the appeal is deemed unnecessary.

Statutes involved: Sec. 792 of Agricultural Code of California; also enforcement provisions, Secs. 784, 785, 785.6, 790 and 831, Deering's Agricultural Code Annotated of the State of California, 1950 edition, and 1959 cumulative supplement, set forth in Appendix II, infra; Federal Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. Secs. 601, 602, 608, 608b, 608c, set forth in Appendix III, infra.

Questions presented by the appeal

(1)

Does not the commerce clause of the United States Constitution (Art. I, Sec. 8, cl. 3), of its own force, preclude inhibition of sale in California of avocados grown in Florida and shipped in interstate commerce, on the ground that said avocados have less than the 8% of oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados of their nature and conditions of growth mature with less than 8% oil content and are not for that reason deleterious, unpalatable, or of inferior quality?

(2)

Does not the application of Sec. 792 of the

Agricultural Code of California to avocados produced in Florida and shipped for sale in California result, in practical effect, in arbitrary discrimination against the Florida fruit to the commercial advantage of the growers and handlers of the avocados produced in California, and thus deny to the shippers of the Florida fruit the equal protection of the law commanded by the Fourteenth Amendment, since the avocados produced in Florida are predominantly of varieties that of their nature and conditions of growth attain maturity and maximal quality with less than 8% oil content, but are not for that reason inimical to health or unpalatable, while the avocados produced in California are predominantly of varieties that of their nature and conditions of growth attain maturity with oil content far in excess of 8%?

(3)

In face of the supremacy clause of the United States Constitution (Art. VI, Sec. 2), may officers of the State of California debar from sale in that state avocados grown in Florida and shipped in interstate commerce in compliance with the maturity and quality regulations for the marketing of said avocados established by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural Marketing Agreement Act of 1937, by disregarding the federal certification of such avocados as of requisite maturity and quality for interstate marketing and, instead, subjecting such avocados to another and different determination of maturity and quality prescribed by state law?

Facts of the case material to the questions presented

Since June 11, 1954 the marketing of avocados grown in South Florida has been regulated by the Secretary of Agriculture of the United States, pursuant to authority vested in him by the Agricultural Marketing Agreement Act of 1937. (Marketing Order No. 69, 19 F. R. 3439, and the numerous orders and regulations thereunder published in the Federal Register from 1954 onward.)

The Marketing Agreement Act grants to the Secretary of Agriculture various regulatory powers aimed to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. (Appendix III, infra.) Of the specific regulatory powers given to the Secretary, the marketing agreement and order with respect to Florida avocados set in action exercise of the power "to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title *** in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." (Appendix III, Ap. p. 50.)

The orders issued by the Secretary govern the "handlers" of the specified agricultural commodity, in "such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or

affects, interstate or foreign commerce in such commodity or product thereof. " (Appendix III, Ap. p. 53 .)

As reason for adoption of the marketing agreement with the growers and handlers of the Florida avocados, the Secretary made findings that 80% to 90% of Florida avocados are sold in markets outside the state, and that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce, or directly affects such commerce. (19 F. R. 2418 and 2784; also Order No. 69, Sec. 969. 0 (2) and (5), 19 F. R. 3439.)

Appellants have been registered handlers of Florida avocados ever since the promulgation of the Secretary's 1954 marketing order; in recent years fully 99% of the avocados handled by them have been marketed outside the state of Florida, all in compliance with the maturity and quality standards established by the Secretary of Agriculture in the exercise of the authority granted to him by the Marketing Agreement Act.

Restriction of access to California market

Although all avocados shipped out of Florida are accompanied by a certificate of inspection issued by the Joint Inspection Service of the United States Department of Agriculture and the Florida Department of Agriculture, showing that the avocados meet the maturity and quality standards in effect under the federal marketing order (PX 3), such certificate is entirely ignored when the fruit enters the

California market. Instead, sale of the avocados in California is barred, by seizure for peremptory condemnation and possible other severe civil and criminal penalties, unless the avocados pass the 8% minimum oil content test imposed by Sec. 792 of the Agricultural Code of California. (Appendix II, Ap. p. 48.) The result has been to frustrate the efforts of appellants to avail themselves fully and freely of the highly favorable market for their avocados in the state of California.

California and Florida are the only states in which avocados are produced commercially. Consumption of avocados is at its highest in California, approximately equal to the consumption of avocados in all of the other states together. Although the California crop of avocados is substantially greater than that of Florida, there are four to five months in the year when the supply of Florida avocados exceeds that of California, the autumn and early winter period. So far as distance is concerned, shipment by refrigerated trucks, speeded in recent years by progressive improvement in motors and highways, has made sale of Florida avocados in California commercially feasible and attractive. The impediment is California's 8% oil content requirement for sale of the fruit in that state.

Effect of California's 8% oil content requirement on marketing of Florida avocados

Avocados are of numerous varieties,

differing radically in external and internal characteristics. In the crop seasons from 1954 onward, 45 named varieties of avocados have been produced commercially in Florida. (PX 6 and 9.) The time of year when the different varieties attain maturity and are ready to be marketed ranges from mid-June to the end of the year. Also, oil content of the avocados, at the time of maturity, varies greatly not only as between the different varieties of the fruit but also between the avocados of the same variety.

Oil content does not enter into the determination of maturity of the Florida avocados. A decade of intensive research on the subject of determination of maturity of Florida avocados, conducted by Dr. Roy W. Harkness, at the Homestead Sub-Tropical Experiment Station of the University of Florida, and by Dr. Paul L. Harding of the United States Department of Agriculture and his staff of assistants, at the Horticultural Field Station of the Department at Orlando and the Agricultural Marketing Service Station at Miami, has led to the conclusion that oil content is not a scientifically valid determinant of maturity of the Florida avocados. The contrary finding of the District Court (No. 6, Appendix I, Ap. p. 38) is unsupported by any evidence in the record of this case. There is no contradiction or impeachment in any respect of the testimony of Dr. Harkness and Dr. Harding, nor any conflicting testimony.

Maturity of the Florida avocados is determined, under the federal regulations, by weight (or size) of the fruit at specified picking dates. For each variety, in each crop season,

permissible picking dates are assigned, based upon the growing conditions in the particular season affecting the crop as a whole, or affecting particular varieties. Three or four successive picking dates are assigned for each variety, about two weeks apart, and at each of these dates the avocados that have attained the specified minimum weight (or size) are permitted to be picked. At each of the successive permitted picking dates the minimum weight requirement is somewhat reduced, until finally the minimum weight requirement is lifted entirely. That this method of determination of maturity of the fruit has proved satisfactory has been confirmed by marketing experience, also by palatability tests of the fruit made in each season since 1954 under the direction of Dr. Harding at the stations of the U. S. Department of Agriculture in Florida. (PX 23, 24, 25, 26.)

The varieties of Florida avocados that mature in the summer months, of West Indian antecedents, practically never attain 8% oil content. Some reach maturity and maximal quality with oil content as low as 2%. The varieties that mature in the autumn months -- the most favorable period for sale of the fruit in California, since production of California avocados is at lowest ebb during these months -- have somewhat higher oil content, but not a single variety attains 8% oil content, in volume sufficient for shipment to California, until a month to two months or more after the commencement of the marketing season for the particular variety. It has never been possible to risk shipment to California of leading varieties of Florida avocados such as the

Waldin, Booth 8, Booth 7, Booth 1, Hickson and Taylor, let alone all of the summer varieties. All of the shipments to California, with possible negligible exception, have been of one variety only, the Lula, and these shipments even though made late in the marketing season for this variety have resulted in substantial losses for failure to pass the 8% oil test. (PX 17 and 21.)* Far more serious than the losses on particular shipments is the fact that no commitments could be made for shipments of the Florida fruit to California upon an assured schedule of deliveries, to synchronize with advertising and promotion programs of large-scale retailers in California.

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* The statement in the opinion of the District Court (Appendix I, Ap. p. 23) that appellants' losses on these shipments "do not appear to be over two or three thousand dollars" is contrary to the evidence. Apparently only the losses sustained by the appellant South Florida Growers Association, Inc., were considered. (PX 17.) On four shipments of Lula avocados made to California by appellant Florida Lime and Avocado Growers, Inc., November 10, 12, 14 and December 8, 1955, the losses aggregated $7,496.01. On a shipment made November 15, 1957, 361 lugs were barred from sale in California for lack of 8% oil content, but in this instance a customer for the fruit was promptly found in Phoenix, Arizona, at no loss to appellant. (PX 21.)

In an attempt to offset the tacit admission that the California 8% oil content requirement absolutely bars sale in that state of certain varieties of Florida avocados of unquestioned quality, appellees sought to show that the marketing of the Florida avocados of West Indian origin in the state of California is not commercially expedient because of time of transportation and short "shelf life." It is also urged that these avocados are of declining commercial importance. In this manner, on scant and insubstantial testimony, appellees assume to judge for the handlers of Florida avocados what shipments of the fruit to California may or may not be commercially advantageous. The assertion that these varieties of Florida avocados are of declining commercial importance is based solely upon a comparison of the volume of these avocados marketed in the 1959-60 season with the volume marketed in the 1955-56 season. (Finding No. 8 - Appendix I, Ap. p. 39.) In the absence of evidence of the weather conditions affecting the production of the specified varieties of avocados in the two selected seasons, such comparison proves nothing. The year-by-year crop records indicate, to the contrary, that these varieties of Florida avocados have not lost ground commercially, although in certain seasons they may have been the principal casualties of frosts and winds that have harassed South Florida.

This diversionary defense ignores the evidence that many pre-tests of different varieties of the Florida-grown avocados were made at the University of Florida Subtropical Experiment Station at Homestead, in the

1954-55, 1955-56, 1956-57 and 1957-58 crop seasons (PX 12 and 13), solely to determine whether shipment of the fruit to California could be hazarded without undue risk of loss for lack of 8% oil content, with the result that shipments of only one variety, the Lula, were ventured.

Substantial nature of questions presented

The national importance of the questions presented by this appeal can hardly be exaggerated. Free access to the California market is denied to the growers and handlers of Florida avocados for the sole reason that these avocados are by nature of lower oil content than the avocados grown in California, with not a word of evidence that the lower oil content of the Florida fruit is indicative of unwholesomeness or inferior quality. The appeal presents a flagrant case of arbitrary restriction of the free flow of commerce among the states, serving only to give commercial advantage to the avocado industry of California over that of Florida. There is vital need for reassertion by this court of its pronouncement that "Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by custom duties or regulations exclude them." (H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 539,

69 S. Ct. 657, 665.)*

Also involved in this case is the thwarting by state officers of California of a national program in aid of agriculture deemed essential to the protection of the national economy. There are currently in effect, under the Agricultural Marketing Agreement Act of 1937, 43 marketing programs in twenty states relating particularly to fruits, vegetables and tree nuts, in which more than 130,000 producers are participants and the products have a farm value in excess of $870,000,000. ("Marketing agreements for fruits and vegetables," pamphlet of the Agricultural Marketing Service of the United States Department of Agriculture, May 1958, and mimeographed supplement listing agreements in force October 24, 1961.) In 41 of these marketing agreements and orders, there are provisions authorizing the establishment of quality requirements in terms of grade, size, maturity, or quality.

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* Minnesota v. Barber, 136 U. S. 313; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497; Best & Co. v. Maxwell, 311 U. S. 454, 455-457, 61 S. Ct. 334, 335-336; Freeman v. Hewitt, 329 U. S. 249, 252, 67 S. Ct. 274, 276; Dean Milk Co. v. City of Madison, 340 U. S. 349, 353-356, 71 S. Ct. 295, 297-299; Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 529-530, 79 S. Ct. 962, 967-968.

Regulation of the interstate marketing of Florida avocados under valid federal law is spurned by the state officers of California, in favor of regulation of the marketing of this fruit under state law. The District Court finds justification for such action in the recent decision of this court in Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S. Ct. 813. Such misapplication of the decision in the case cited, appellants submit, calls for emphatic repudiation. There is occasion, on this appeal, for reassertion of the basic constitutional principle that "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." (Simpson v. Shepard, 33 S. Ct. at p. 739.)

Respectfully submitted,

Isaac E. Ferguson,

Attorney for appellants.

APPENDIX I

OPINION OF DISTRICT COURT

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California, Defendants. Civil No. 7648.

Memorandum and Order

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal

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1. The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25[d]).

Protection Clauses of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U. S. C. §601 et seq.) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states. California has a law (California Agricultural Code, §792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This court initially dismissed the action for want of a present, actual case or controversy (Florida Lime & Avocado Growers vs. Jacobsen, 169 F. Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (Florida Lime & Avocado Growers vs. Jacobsen, 362 U. S. 73).

The case has now been heard by a three-judge court, pursuant to the provisions of Title 28 U. S. C. §§ 2281 and 2284. The evidence has been heard, with the rulings on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the court for its

determination.

The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, arguendo, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification. [2]

The Facts

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties. Florida grows principally avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

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2. It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this state contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant aftertaste. If they are picked when mature, they ripen while softening, and become palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

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3. Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked

until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not per se bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste. [4] Defendants offered

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4. It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even (Continued)

testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

Equitable Jurisdiction

A court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction suspending the enforcement of the laws of the

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4. (Continued) if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit (that is, the test might be made only on fruit which had given physical indications during softening that it was mature).

State of California.[5] If the instant case were before this court for the first time, the court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: Watson vs Buck, 313 U. S. 387; A. F. of L. vs. Watson, 327 U. S. 582).

If the court were required to take equitable jurisdiction of the instant case, coming before this court for the first time, it might well be advisable for the court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento[6] (See: A. F. of L. vs. Watson, supra).

This case is now before this court, however, with a mandate from the United States Supreme Court, directing this court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This

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5. For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of Florida Lime & Avocado Growers vs. Jacobsen, supra, at 362 U. S. 77.

6. Case No. 125826, in the records of that court.

court concludes, therefore, that in the instant case this court has no discretion to decline equitable jurisdiction or to retain jurisdiction while awaiting state court decision.

The Merits of the Controversy

In the remainder of this opinion, we will consider, first, the constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C. J. S. pp. 713-714; O'Brien vs. Equitable Society, 212 F. 2d 383; and See: United States vs. Denver & R. G. Ry. Co., 191 U. S. 84; Northern P. Ry. Co. vs. Lewis, 162 U. S. 366; and Morse vs. Fields, 127 F. Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (Williamson vs. Lee Optical Co., 348 U. S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the

light of which the enactment is reasonable, then it is for the legislature, not this court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

Constitutionality of the California Law

A. Equal Protection

Plaintiffs contend that the California 8% oil content test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: Phillips Chemical Co. vs. Dumas School District, 361 U. S. 376). It is not enough that a classification by state law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (Allied Stores of Ohio vs. Bowers, 358 U. S. 522 and Borden's Co. vs. Ten Eyck, 297 U. S. 251). It is for the legislature, not the courts, to write the laws. The people, if the legislature commits abuses, have their remedy at the polls (Williamson vs. Lee Optical Co., supra).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity.

The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable support for the decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (St. John vs. New York, 201 U. S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: St. John vs. New York, supra). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all avocados sold for human consumption. The

general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable. [7]

Granting the possibility of a better law than the one devised by the California legislative authorities, that does not require a finding that the law which has been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the state in interstate commerce (See: Milk Board vs. Eisenberg Co., 306 U. S. 346; Simpson vs. Shepard, 230 U. S. 352). It

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7. The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (Simpson vs. Shepard, supra; Mintz vs. Baldwin, 289 U. S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (Huron Cement Co. vs. Detroit, 362 U. S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf

life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of de minimis non curat lex.

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this state of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this state have been marketed successfully after passing the California test.

Looking at the testimony of plaintiffs' witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatment, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil

requirement is not unconstitutional.

Alleged Conflict Between State and Federal Law

The remaining question for the court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they may market their avocados without further inspection by the states, if they comply with the shipping dates established by the federal order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U. S. C. § 121).

The federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69,

or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any federal law or order. For all that the federal law declares, avocados grown in any state but Florida may be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the federal order. If the implication of federal pre-emption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication should not lightly be made (Cloverleaf Co. vs. Patterson, 315 U. S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide

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8. At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

field for the protection of consumers by the states by the appropriate exercise of the state police power (See: Reid vs. Colorado, 187 U. S. 137). The case would be different if the federal government had established a complete and uniform regulatory scheme which covered the whole problem (See: Oreg.-Washington Co. vs. Washington, 270 U. S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of Mintz vs. Baldwin, supra. In that case, the granting of a federal certificate would have prevented the application of state inspection requirements, only because the federal law there interpreted expressly so stated.

In Cloverleaf Co. vs. Patterson, supra, it was declared that where a federal statute does not in specific terms prohibit state action, it must be clear that the federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the federal government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this court would be required to overrule Cloverleaf Co. vs. Patterson, supra. This, the court has neither the power nor the inclination to do.

Both the state and the federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority against seeking out conflict between state and federal regulation, unless such conflict clearly exists (Huron Cement Co. vs. Detroit, supra).

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any federal law or regulation.

IT IS, THEREFORE, ORDERED that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

AND IT IS FURTHER ORDERED that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the

clerk of this court pursuant to the applicable rules and statutes.

DATED: July 12, 1961

HOMER T. BONE
Senior Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge

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In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. Charles Paul, Director of the Department of Agriculture of the State of California; Edmund G. Brown, Governor of the State of California; and Stanley Mosk, Attorney General of the State of California, Defendants. Civil No. 7648.

Findings of Fact and Conclusions of Law

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

Findings of Fact

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across

the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is effective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

Conclusions of Law

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plaintiffs' application

for such an injunction was properly heard before this three judge court under 28 U. S. C. 2281.

2. The court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and

Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby ordered to be entered accordingly.

Dated: September 21, 1961.

HOMER T. BONE
United States Circuit Judge

SHERRILL HALBERT
United States District Judge

APPENDIX II

AGRICULTURAL CODE OF CALIFORNIA, DIVISION V, STANDARDIZATION*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to

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*Deering's Agricultural Code of the State of California, 1950, with supplement covering legislation through 1959 session.

condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owners.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an

interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 606, § 2, ch. 752, § 1; Stats. 1955, ch. 431, § 1.)

Section 785.6. Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered. Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects,

including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937*

7 U. S. C. A. Sec. 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U. S. C. A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

*The Agricultural Marketing Agreement of June 3, 1937 (7 U. S. C. A. sections 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U. S. C. A. page 337.)

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum st ndards of quality and maturity and such gr ling and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk

and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 607, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-19, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U. S. C. A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for

the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * * * *

7 U. S. C. A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling

of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of said sections. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 166, Title II, §206(d), 61 Stat. 208.

7 U. S. C. A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens,

obstructs, or affects, interstate or foreign commerce or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-19, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any

specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers;

* * * * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

* * * * * * *

Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 495

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 557

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

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MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that appellants' appeal from the judgment of the district court be dismissed because it is not within the jurisdiction of this Court. Appellees move, in the alternative, that the judgment be affirmed on the ground that the question presented is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the district court for the Northern District of California, Northern Division, is printed in Appendix A, and is reported in 197 F. Supp. 780 (1961). Copies of the Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters, filed September 21, 1961, Findings of Fact and Conclusions of Law, filed September 21, 1961, and the judgment entered September 22, 1961, are set forth in Appendix A hereto.

JURISDICTION

This action was brought under 28 U.S.C. 1331 and 1337 to enjoin enforcement of California Agricultural Code Section 792 as unconstitutional. The judgment dismissing appellants' action signed by two judges of the statutory three-judge court convened under 28 U.S.C. 2281 and 2284 was entered September 22, 1961. Appendix p. 51. Appellants' Notice of Direct Appeal to this court was filed in the district court on October 10, 1961. Dkt. #128.[1] Appellants seek to invoke the jurisdiction of this court under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. 1253, this court has jurisdiction of the appeal from a judgment of a district court dismissing appellants' action which found that appellants' evidence had failed to establish a case within the equity jurisdiction of the district court.

[1] "Dkt. # ____" refers to the number marked in red on each document in original record on appeal.

2. Whether, under 28 U.S.C. 1253, this court has jurisdiction of an appeal from a judgment dismissing appellants' action signed by two judges of a statutory three-judge court convened under 28 U.S.C. 2281 and 2284, one judge having died before entry of findings and final judgment.

3. Whether, assuming the judgment of the district court is appealable under 28 U.S.C. 1253, Appellants' Jurisdictional Statement raises substantial questions requiring further argument.

STATUTES INVOLVED

The pertinent provisions of the California Statutes (Calif. Agr. Code, Secs. 784, 785, 785.6, 792, 831) and of the California Regulations (3 Calif. Adm. C., Secs. 1366.2 and 1397.6) are set forth in Appendix B hereto.

The provisions of 28 U.S.C. 1253, 2281 and 2284 are set forth in Appendix C hereto.

STATEMENT

A district court convened pursuant to 28 U.S.C. Secs. 2281 and 2284, dismissed appellants' action on the merits after trial by judgment entered September 22, 1961. Appellants' complaint had sought declaratory judgment and an injunction restraining the enforcement of Section 792, California Agricultural Code, on the ground of its invalidity under the Federal Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (which re-enacted with amendments 48 Stat. 31 and 49 Stat. 750), as unconstitutional under

the Commerce and Equal Protection Clauses of the United States Constitution.

Section 792 of the California Agricultural Code is part of a comprehensive statutory program establishing quality and maturity standards for a large number of agricultural products (see California Agr. Code, Div. 5, "Standardization," Secs. 751-1149.9, 3 Calif. Adm. C., Secs. 1366-1478). Section 792 prescribed standards for avocados. This section provides, in relevant part: "All avocados at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil by weight of the avocado excluding the skin and seed." This 8 percent oil content standard for avocados was enacted into law by the California Legislature in 1925. Ch. 350, Calif. Stats. 1925, Ch. 350, p. 633.

The district court found that: (1) appellants neither suffered nor were threatened with irreparable injury and that appellants' evidence failed to establish a case within the equity jurisdiction of the district court, (2) that Section 792, Agricultural Code, is consistent with the provisions of the Federal Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, and with the marketing regulations for avocados grown in south Florida issued thereunder, and (3) that Section 792, Agricultural Code, is consistent with the Commerce and Equal Protection Clauses of the United States Constitution. Appendix p. 45.

In its Memorandum and Order, filed July 12, 1961, the district court found that while the appellants'

evidence failed to establish a case within the equity jurisdiction of the district court, it felt compelled to adjudicate the merits because of the language in the remand of this Court. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 75, 86 (1960). Appendix p. 33.

At the trial before the three-judge district court held February 7 and 8, 1961, appellants' case consisted of the testimony of Paul Louis Harding, Supervisory Plant Physiologist, United States Department of Agriculture. (Tr. 3.[2]) Mr. Harding testified to the horticultural nature of avocados grown in Florida and described the experimental work on avocados performed by the United States Department of Agriculture. (Tr. 2-97.)

Appellants at the trial also offered in evidence en masse the transcripts of depositions of five witnesses, together with the twenty-two exhibits attached thereto. (Tr. 29.) Upon appellees' objection, the court reserved decision on their admissibility. (Tr. 29.) After considering appellees' written objections, the court ruled that the depositions and exhibits were inadmissible in evidence. (Appendix p. 43; Dkt. #110, pp. 12-50.[3]) The three-judge court excluded exhibit 23 for identification from evidence and reserved ruling on the admissibility of appellants' exhibits for

[2] Notation "Tr. _____" refers to partial reporter's transcript of testimony, heard February 7 and 8, 1961.

[3] "Plaintiffs' exhibits for identification 1 through 26 are not admitted into evidence, but have been considered by the [District] Court as an offer of proof by the plaintiffs;" Appendix p. 43; Dkt. #121.

identification 24, 25 and 26. (Tr. 26, 69.) After considering appellees' written objections, the court thereafter ruled Exhibits 24, 25 and 26 to be inadmissible in evidence. Appendix p. 43; Dkt. #110, pp. 42-46.

Appellants' Jurisdictional Statement on pages 7, 9, 10, 11 and 13 cite to plaintiffs' [appellants'] Exhibits 3, 7, 9, 12, 13, 17, 21, 23, 24, 25 and 26. It is suggested that these citations, stated without qualification, are erroneous since these exhibits were excluded from evidence by the trial court. (Dkt. #121; Appendix p. 43.) Appellants do not contest in the questions presented in their Jurisdictional Statement either the correctness of the ruling of the trial court excluding these exhibits from evidence, nor the sufficiency of the evidence to support the findings. Appellants' Jurisdictional Statement pp. 4-5. Compare Rule 15(1)(c)(1), Revised Rules of the Supreme Court; *Roth* v. *United States,* 354 U.S. 476, 490, fn. 27 (1957). Since appellants do not seek review of these evidentiary rulings, the exhibits and depositions are irrelevant, even if considered as properly part of the record on appeal as an offer of proof. *Idaho and Oregon Land Co.* v. *Bradbury,* 132 U.S. 509, 518 (1889).[4]

[4] Appellants suggested at the trial that these depositions and exhibits became evidence in the case because reference was made to them, *inter alia,* in the previously filed motions to dismiss. Dkt. #22 and 23. This reference to the depositions and exhibits in the motions to dismiss was proper since the district court, when a question of its jurisdiction is raised, may inquire, by affidavits or otherwise, into the facts as they exist. *Land* v. *Dollar,* 330 U.S. 731, 734, fn. 4 (1947). However, appellants' "admissions" made in the

The Honorable Homer T. Bone, United States Circuit Judge, Louis E. Goodman, United States District Judge, and Sherrill Halbert, United States District Judge, heard the evidence presented by the parties February 7 and 8, 1961, and signed the memorandum opinion of the court, filed July 12, 1961, which directed that appellees prepare findings, a form of judgment, and all other documents necessary to dispose of the action. However, District Judge Louis E. Goodman died September 15, 1961, and was unable to sign the "Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters" and the "Findings of Fact and Conclusion of Law" filed September 21, 1961, nor the "Judgment" entered September 22, 1961. These orders, findings and judgment were signed by United States Circuit Judge Homer T. Bone and by United States District Judge Sherrill Halbert, Appendix pp. 43-51.

Appellants did not seek leave to amend their complaint, nor did they petition for rehearing following the dismissal of the action by the district court.

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motions to dismiss were made only for the purpose of questioning the jurisdiction of the district court, and were not intended as a binding waiver on the merits of the material facts put in issue by appellees' answers. Dkt. #72, 127. Compare *M. Snower & Co.* v. *United States*, 7 Cir., 140 F. 2d 367, 370 (1944), motion for judgment on the pleadings; *Begnaud* v. *White*, 5 Cir., 170 F. 2d 323, 327 (1948), motion for summary judgment; *Prepo Corporation* v. *Pressure Can Corporation*, 7 Cir., 234 F. 2d 700, 703 (1956), motion for summary judgment.

ARGUMENT

I. Appellants' Appeal Should Be Dismissed.

A. APPELLANTS' CASE ON FINAL HEARING DID NOT FALL WITHIN 28 U.S.C. 2281 AND THEREFORE NO DIRECT APPEAL LIES UNDER 28 U.S.C. 1253.

The Judicial Code provides that only a district court of three judges may grant "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute" upon the unconstitutionality of such statute. 28 U.S.C., Sec. 2281. The allegations of the complaint against appellee officers presented on their face every prerequisite to three judge action. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960). But when it became apparent, as it did upon the final hearing for permanent injunction,[5] that the appellants' evidence failed to establish a case within the equity jurisdiction of the district court, then there was no longer cause for proceeding under 28 U.S.C. 2281, and direct appeal to this court does not lie under 28 U.S.C. 1253. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U.S. 386 (1934). In this latter case appellants had directly appealed from a judgment of a three-judge district court convened under Section 266, Judicial Code (predecessor to

[5] The findings of the district court recite:

"13. Plaintiffs have neither suffered nor been threatened with irreparable injury."

"3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this [District] Court." Appendix p. 48.

28 U.S.C., Sec. 2281) which had dismissed the action for want of equity. On appeal, a unanimous Court held that it lacked appellate jurisdiction since a final hearing was not prescribed by Section 266, Judicial Code, and direct appeal was authorized only from the decree of a three-judge district court.[6] The district court judgment was vacated and the cause remanded. *Ibid.* 292 U.S. 386, 392 (1934).

The issue is not one of the federal jurisdiction of the district court, but whether a final hearing was prescribed by 28 U.S.C. 2281. The three-judge procedure is an extraordinary one, and imposes a heavy burden on the federal judicial system. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 377 (1949); The Three-Judge Federal Court in Constitutional Litigation, 27 University of Chicago Law Review, 555, 563-566. That procedure is designed for a specific class of actions, sharply defined, and was not intended by Congress to govern all suits in which the object is to restrain the enforcement of a state legislature action. *Ex parte Collins,* 277 U.S. 565, 568-569 (1928). "The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint alleging that the suit is one to restrain action of state officers, with no support whatever in fact and law. . . .

[6] Judicial Code, Section 266, was amended by Congress in 1925, to require three-judge District Courts to hear applications for both interlocutory and permanent injunctions on grounds of federal unconstitutionality. Act of February 13, 1925, 43 Stat. 938; see *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, 84 (1960).

When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed and direct appeal here must fall. . . ." *Oklahoma Gas Co.* v. *Packing Co.*, 292 U.S. 386, 391-392 (1934). *Oklahoma Gas & E. Co., supra,* was cited with approval in *Water Service Co.* v. *Redding,* 304 U.S. 252, 255 (1938), *Per Curiam* affirmance of dismissal in district court; *Wilentz* v. *Sovereign Camp,* 306 U.S. 573, 582 (1939), appeal dismissed by a unanimous Court; and in *Ex parte Bransford,* 310 U.S. 354, 361 (1940), motion for leave to file mandamus denied by a unanimous Court. Compare *Public Service Comm'n* v. *Wycoff,* 344 U.S. 237, 240 (1952), which held that a one-judge district court properly dismissed an action to enjoin interference by state officers with appellees' carriage of motion picture film where, at the trial, there was a failure of proof of irreparable injury.

Congress carried over the wording in Section 266 Judicial Code, 36 Stat. 1162 (1911), into 28 U.S.C. 2281, 62 Stat. 968 (1948). The use of substantially the same language in the 1948 revision of Section 266, Judicial Code, is persuasive that the judicial construction of the statute in *Oklahoma Gas & Electric Co.,* 292 U.S. 386 (1934) is the correct one. When Congress has desired to change the construction of the statute made by the court, it has done so directly, e.g. the act of June 25, 1948, 62 Stat. 961, making the three-judge requirement applicable indiscriminately on

hearings for either interlocutory or permanent injunction and changing the ruling made in *Smith* v. *Wilson,* 273 U.S. 388 (1937), that the three-judge requirement is applicable only where application for interlocutory injunction was made and pressed. Section 266, Judicial Code, as enacted 36 Stat. 1162 (1911), and 28 U.S.C. 2281, together with their legislative history is set forth in the Appendix p. 61.

In the court below, it was suggested that consideration of the issue of equitable jurisdiction was foreclosed by the previous order of this court reversing the judgment below and remanding for further proceedings. Appendix p. 33. *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, 86 (1960). Appellees originally had moved in the trial court, *inter alia,* that appellants' action be dismissed for lack of equity jurisdiction. Dkt. #22, 23. The district court did not reach this issue stating "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' [appellees'] motions to dismiss." *Florida Lime & Avocado Growers* v. *Jacobsen,* 169 F. Supp. 774, 776 (1958). Appellants did not raise the issue of the equitable jurisdiction of the district court in either their previous notice of appeal or in their jurisdictional statement, and this issue was not considered by this court in the previous appeal. Appellants' Jurisdictional Statement, *Florida Lime Growers* v. *Jacobsen,* U.S. Supreme Court, Oct. Term 1959, #49, p. 6. This court in its carefully drawn opinion observed this distinction, saying that the allegations

of appellants' complaint were sufficient to show that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73, 85-86 (1960). In short, the questions as to whether appellants have shown facts establishing a case within the equity jurisdiction of the district court formed part of the dispute between the parties, and was still pending before the district court after remand.

Since the final hearing was not one that was required to be heard by a three-judge district court, a direct appeal to this court may not be taken under 28 U.S., Sec. 1253. *Oklahoma Gas Co.* v. *Packing Co.,* 282 U.S. 386 (1934). Compare *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368 (1949). The judgment in such action is that of a one-judge district court and the appeal must be taken to the appropriate court of appeals. *Ibid.,* 336 U.S. 368 at 380-381 (1949).[7]

B. THE JUDGMENT BELOW IS INVALID, IF CONTROLLED BY 28 U.S.C. 2281, IN THAT ONLY TWO JUDGES PARTICIPATED IN MAKING THE FINDINGS AND JUDGMENT.

1. Appellants have not raised the question of the validity of the district court's judgment because it

[7] Unlike in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, the appeal may not be considered as a petition for certiorari because there has been no appeal taken to the Court of Appeals for the Ninth Circuit. There is, therefore, no case in the Court of Appeals. See 28 U.S.C., 1254(1). There is no statutory authority for review of a district court case by writ of certiorari.

was made by two of the three judges who heard the case, Judge Goodman having died after the trial. Appellants' Jurisdictional Statement, p. 3. The issue, however, requires discussion since the court's jurisdiction of the appeal hinges on the validity of the district court judgment. *Ayrshire Corp. v. United States,* 331 U.S. 132 (1947), appeal from the judgment of a three-judge district court, convened under Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, now 28 U.S.C. 2325, district court judgment vacated, and appeal dismissed.

The provisions of the applicable statutes, 28 U.S.C. 1253, 2281 and 2284 are set forth in Appendix C, pp. 58-61.

In chronological sequence, the course of the litigation was as follows: Trial before United States Circuit Judge Bone, and United States District Judges Goodman and Halbert was heard February 7 and 8, 1961. Tr. 2, 128. A memorandum and order announcing judgment for appellees was signed by the three judges and was filed July 12, 1961. Appendix p. 27. United States District Judge Louis E. Goodman died on September 15, 1961. Appendix p. 44. The Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters, and Findings of Fact and Conclusions of Law were signed by Judge Bone and Judge Halbert, and were filed September 21, 1961. The judgment, dismissing appellants' action, signed

by Judge Bone and Judge Halbert, was entered September 22, 1961.

2. Appellees have hereinabove argued that the three-judge requirement of 28 U.S.C. 2281 was no longer prescribed after it became apparent at the trial that appellants had no case warranting equitable relief. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U.S. 386 (1934), discussion *supra* at pp. 8-12. If so, then the judgment below was that of a one-judge district court, whose valid judgment was appealable to the court of appeals and not to the United States Supreme Court. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 380-381 (1949).

3. However, the court may not agree with this reasoning. In such case it is necessary to reach the question as to whether a valid judgment has ever been entered by the trial court under 28 U.S.C. 1253 and 2281. 28 U.S.C. 2281 requires that applications for injunction restraining state statutes be "heard and determined" by a district court of three judges proceeding under 28 U.S.C. 2284. 28 U.S.C. 1253 provides for a direct appeal to this court from the order denying a permanent injunction in any action required to be "heard and determined" by a district court of three judges. In the instant case, three judges did sign a "Memorandum and Order" filed July 12, 1961. Appendix p. 42. However, this "Memorandum and Order" was not intended by the court below to constitute its "determination" of the case under 28 U.S.C. 2281 since it directed appellees to prepare proposed

findings and judgment in the action, and to prepare ". . . all other documents necessary for the full and complete disposition of the case . . ." Appendix p. 42. Compare *Comm'r* v. *Estate of Bedford,* 325 U.S. 283, 286 (1945). For the same reason, it is evident that this "Memorandum and Order" was not intended to constitute entry of judgment under 28 U.S.C. 1253, Rules 58 and 79(b), Federal Rules of Civil Procedure, and Rule 21, Rules for the United States District Court for the Northern District of California.[8]

If the three-judge requirements of 28 U.S.C. 2281 and 2284 were applicable to the final judgment disposing of the action, and if the "Memorandum and Order" filed July 12, 1961, did not constitute the required "determination" of the cause, then no valid judgment has been entered in the action. In such case, the appellants' appeal must be dismissed since no appealable judgment under 28 U.S.C. 1253 has been entered in the District Court.

It is clear that the determination of the findings of fact and conclusions of law reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge. Thus, where only two judges participate in the settling of the findings and in the draft-

[8] "Where written order of judgment is to be prepared by counsel and settled, no memorandum of decision or opinion or any minutes made by the clerk of the court's decision shall constitute entry of judgment under said [Federal] Rules [of Civil Procedure]." Rule 21, Rules for the United States District Court, Northern District of California.

ing of the final judgment, there has been an adjudication by less than the required three judges under 28 U.S.C. 2284, and the action of the two judges is a nullity. See *Ayrshire Corp.* v. *United States*, 331 U.S. 132 (1947).[9] In the *Ayrshire* case, a three-judge district court had been convened to hear applications for injunctions restraining proposed action by the Interstate Commerce Commission as required by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 now 28 U.S.C. 2325. Oral argument upon the hearing for permanent injunctions was heard before three judges on April 22, 1946. Thereafter, on June 5, 1946, findings of fact, conclusions of law, and a judgment dismissing the actions signed by two of the judges were entered, one judge being ill. The findings recited in the margin that "Judge Evan A. Evans became ill subsequent to the hearing of these causes and he is and has been unable to participate in a determination thereof. . . ." 331 U.S. 132, 134. On these facts, the court held that the statutory requirement that the application for injunction be "heard and determined by three judges" required that all three judges participate in the settlement of the findings of fact, conclusions of law, and in the drafting of the judgment. 331 U.S. 132, 139. Since the judgment

[9] Where a trial court's written opinion constitutes the findings of fact and conclusions of law, under Rule 52(a), Federal Rules of Civil Procedure, the opinion constitutes the determination of the case under 28 U.S.C. 2281. Cf. *Dohany* v. *Rogers*, 281 U.S. 362, 369-370 (1930), denial of application for interlocutory injunction and dismissal of action, opinion of three-judge district court held to be the determination of the cause under Judicial Code, Section 266.

below was void, the court vacated the judgment and dismissed the appeal. 331 U.S. 132, 144.

Applications for injunctions to restrain state statutes must be "heard and determined by a district court of three judges" under 28 U.S.C. 2281. The use of the same phrase in both 28 U.S.C. 2281, 62 Stat. 968 (1948), and in 28 U.S.C. 2325, 62 Stat. 970 (1940), successor to the three-judge provision in the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, is persuasive that the judicial construction made by the Court in the earlier *Ayrshire Corp.* case (331 U.S. 132) is correct, and that it should be the same in cases arising under 28 U.S.C. 2281. Further, 28 U.S.C. 2284(5), 62 Stat. 968 (1948), provides that "A single judge shall not . . . dismiss the action, or enter. . . . final judgment."[10] If one judge may not enter final judgment where the statute requires participation of three judges then two judges may not do so. If, therefore, the three-judge requirement prescribed by 28 U.S.C. 2281 applied to the final judgment entered September 22, 1961, in this action, then said judgment was void and appellants' appeal must be dismissed.

II. If the District Court Judgment Falls Within the Appellate Jurisdiction of This Court, That Judgment Is Correct and Should Be Affirmed.

A. THE CALIFORNIA AVOCADO MATURITY LAW IS VALID UNDER THE COMMERCE CLAUSE.

California's Avocado Maturity Law was enacted in 1925, when practically all of the avocados produced in

[10] See House Report No. 1677, 77th Congress, 2nd Session, p. 1-2.

the United States came from that State. Calif. Stats. 1925, Ch. 350, pp. 625, 633. Appendix p. 29. The purpose of California Agricultural Code, Section 792, was to prevent the marketing of immature avocados, and thereby to protect the welfare of consumers and producers of avocados. As stated in a 1930 report of the University of California:

> "In order to provide for uniformity in the maturity of the fruit at the time of harvesting and especially to prevent the sale of immature avocados, a practice which had become a menace to the industry, the California avocado growers in 1925 succeeded in having a state maturity standard of 8 per cent fat or oil content established. This action has been productive of very great benefit to the industry in that it has effectively eliminated immature fruit, mostly windfalls or stolen fruit, from the markets."
>
> The California Avocado Industry, California Agricultural Extension Service, University of California, Circular 43, April 1930, page 39.

Similar state agricultural inspection statutes have been held valid under the Commerce Clause where intended in good faith to protect the public health and safety. *Sligh v. Kirkwood,* 237 U.S. 52 (1915), criminal offense to deliver immature citrus fruit for shipment in interstate commerce; *Patapsco Guano Co.* v. *North Carolina,* 171 U.S. 345 (1898), statute imposing fees for inspection of commercial fertilizer in interstate commerce; compare *Huron Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), municipal smoke

abatement statute applied to steam vessels moving interstate commerce.

The findings of fact made by the trial court are set out at length in the appendix pages 45 to 49. In summary, the district court found that avocados grown in the United States are harvested while hard and inedible. If picked when immature the fruit shrivels and assumes a rubbery texture and develops a bitter inedible taste. In contrast, the avocado softens into a palatable fruit if picked when mature. Growers are tempted to pick in the early portion of the growing season when avocados are in short supply and the market price high. Because avocados are picked and shipped while hard, and because consumers and retail grocers cannot easily determine whether a hard avocado is mature, there is a danger that immature avocados will be marketed to the detriment of both the consuming public and the avocado industry.

Other than water, oil is the chief constituent of avocados. The percentage of oil increases during the growth of the fruit to a maximum during the maturity of the fruit. Oil content is the best index of maturity of the avocado. Avocados grown in Florida can be grouped into three classifications: (1) varieties tracing their origin to the West Indies; (2) varieties which are hybrids developed from varieties tracing their origin from the West Indies and from varieties originating in Guatemala; (3) varieties tracing their origin to parent trees in Guatemala. The hybrid and

Guatemala varieties, constituting about 88 percent of Florida production, exceed 8 percent in oil content while in prime commercial marketing condition, and can therefore meet the California oil content standard. This requirement is effective to keep immature fruit of these varieties from being marketed. The West Indian varieties, constituting about 12 percent of Florida production, have such poor shipping qualities and retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California.

From these facts the district court concluded that the California inspection law applies fairly to appellants since those varieties of avocados which can be shipped across the continent without spoiling can meet the minimum 8 percent oil requirement. Those varieties of avocados, few in number and low in volume, which mature before reaching 8 percent oil content, are so perishable that it is not commercially practicable to market them in California. It follows that appellants' claim of discrimination as to these West Indian varieties is hypothetical, and is without merit as applied to the hybrid and Guatemalan varieties.

B. THE CALIFORNIA ENACTMENT IS VALID UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment does not require perfection in legislative classifications. *Phillips Co.* v. *Dumas School District*, 361 U.S. 376, 385 (1960). Its prohibition goes no

further than the invidious discrimination. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). A legislative classification will stand if any statement of facts reasonably can be conceived that would sustain it. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959). The California requirement of 8 percent oil content is rationally related to the objective of keeping immature avocado fruit off the market. Appendix p. 29. Tr. 111-112; 136-137; 164.

Appellants' Questions Presented do not question that the findings of the trial court are supported by the evidence. As summarized above, these findings are that the application of the California statute to the West Indian varieties of avocados is hypothetical because of their high perishability. The remaining varieties, approximately 88 percent of the Florida commercial production, do reach and exceed 8 percent oil content at commercial maturity, and the California law is valid as applied to such varieties. Just as the findings and the evidence fail to support appellants' claim of discrimination under the Commerce Clause, they fail to support appellants' claim of discrimination under the Equal Protection Clause.

C. THE CALIFORNIA STATUTE IS CONSISTENT WITH THE FEDERAL MARKETING STATUTE AND REGULATIONS.

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, it is asserted, gives to plaintiffs the right to market their avocados in California free of state inspection, and free of the state police power to protect California consumers from immature fruit. The

issue raised is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the states. The policy of accommodation formulated by this Court is: "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be directed and positive, so that the two acts could not be reconciled or consistently stand together;" *Sinnot* v. *Davenport*, 22 How. 227, 243 (1860); see *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 448 (1960).

The objective of the Agricultural Marketing Agreement Act of 1937, 48 Stat. 32, 49 Stat. 750, as amended by 50 Stat. 246, is stated to be the establishment, by exercise of the power conferred on the Secretary of Agriculture, of "orderly marketing conditions for agricultural commodities in interstate commerce," such as will tend to establish "parity prices" for farm products.

The goal of the California standardization statute is "to promote the development of the California fruit, nut and vegetable industry, and to prevent deception in the packing, marking, shipping or sale of fruits, nuts and vegetables for state, interstate or foreign commerce. . . ." California Statutes of 1925, Chapter 350, pages 625, 633.

As outlined, the federal act is designed to establish parity prices paid for agricultural commodities in in-

terstate commerce. On the other hand, the state enactment is a police measure intended to keep unfit agricultural commodities off the market. No conflict of legislative objective exists between the laws.

Plaintiffs in this case place heavy reliance on the fact that avocados shipped from designated counties in south Florida must receive inspection by the Federal-State Inspection Service prior to shipment. 7 C.F.R. 969.4; 969.54. It is asserted that this inspection frees such avocados from inspection at California terminal markets. However, in a comparable case, the court has upheld an additional state inspection standard. In *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960), the appellant shipowner had obtained Coast Guard safety inspection of its ships' boilers, and had obtained a certificate authorizing operation of the ships under federal law. Upon docking in the City of Detroit, that city commenced criminal proceedings under the Detroit Smoke Abatement Code after the boilers had emitted excessive smoke. The state inspection act was held valid despite the fact that appellant could not prevent the emission of excessive quantities of smoke from the federally approved boilers then installed on the ships.

The opinion states: "The thrust of the federal inspection laws is clearly limited to affording protection from the perils of maritime navigation . . . By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and

enhance the cleanliness of the local community." Id., at 445. After the finding that there was no conflict between the two laws, the court then held that appellants' federal license availed it nothing, saying: "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." Id., at 447. Similarly, in the instant case, the mere fact of federal inspection does not afford plaintiffs immunity from state inspection.

In enacting the federal marketing act, Congress did not intend to occupy the field to the exclusion of state regulation. *Parker* v. *Brown*, 317 U.S. 341, 358 (1943). In *Hood & Sons* v. *DuMond*, 336 U.S. 525, 542 (1949), the Court stated:

> "We assume, though it is not necessary to decide, that the Federal [Agricultural Marketing Agreement] Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause."

The core of plaintiffs' argument on pre-emption is that the state cannot subject products to additional regulation once they have entered the stream of commerce pursuant to a federal marketing order. How-

ever, the Federal Marketing Act expressly contemplates dual regulation by the federal government and the states. Section 18, Act of August 24, 1935, 49 Stat. 750, 767-768.[11]

Further, there is no conflict in the administration of the federal enactment since the California inspection occurs after the avocados leave the Florida area of production. 7 C.F.R. 969.4. The facts in this case are similar to those in *Reid* v. *Colorado*, 187 U.S. 137 (1902). Appellant Reid had obtained federal disease inspection of his cattle in Texas. Upon shipment of the cattle to Colorado, he had refused to pay for state disease inspection. His criminal conviction for having failed to obtain state inspection was affirmed by the Court, even though there was no proof that any of the cattle were diseased. No conflict with state law was found since the Court found that Congress had not intended to exclude state disease inspection of cattle, and that the state enactment was reasonably designed to protect the property of its people from injury. *Ibid.* 187 U.S. 137, 152.

The California inspection law may therefore lawfully be enforced against appellants since the Federal Marketing Act was not intended to prevent state inspection of foods passing in interstate commerce, and because the state act does not interfere with the administration of the federal law.

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[11] "The Secretary of Agriculture . . . is directed . . . to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; . . to issue orders . . . complementary to orders or other regulations issued by such authorities;" 49 Stat. 750, 767-768.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed or, in the alternative, that the judgment of the district court should be affirmed.

Respectfully submitted,

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December, 1961

APPENDIX A

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

MEMORANDUM AND ORDER

Filed July 12, 1961

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal Protection Clauses of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U.S.C. §601 *et seq.*) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states. California has a law (California Agricultural Code, § 792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This Court initially dismissed the action for want of a present, actual case or controversy (*Florida Lime*

[1] The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25(d)).

& *Avocado Growers vs. Jacobsen*, 169 F.Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (*Florida Lime & Avocado Growers vs. Jacobsen*, 362 U.S. 73).

The case has now been heard by a three-judge Court, pursuant to the provisions of Title 28 U.S.C. §§ 2281 and 2284. The evidence has been heard, with the rulings on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the Court for its determination.

The Court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the Court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification.[2]

THE FACTS

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties. Florida grows principally

[2] It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this State contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant aftertaste. If they are picked when mature, they ripen while softening, and become palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and

[3] Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the

age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most

immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not *per se* bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste.[4] Defendants offered testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this Court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

[4] It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit (That is, the test might be made only on fruit which had given physical indications during softening that it was mature.).

EQUITABLE JURISDICTION

A Court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction suspending the enforcement of the laws of the State of California.[5] If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: *Watson vs. Buck*, 313 U.S. 387; *A.F. of L. vs. Watson*, 327 U.S. 582).

If the Court were required to take equitable jurisdiction of the instant case, coming before this Court for the first time, it might well be advisable for the Court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California Courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento.[6] (See: *A.F. of L. vs. Watson, supra*).

This case is now before this Court, however, with a mandate from the United States Supreme Court, directing this Court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This Court concludes, therefore, that in the

[5] For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of *Florida Lime & Avocado Growers vs. Jacobsen, supra*, at 362 U.S. 77.

[6] Case No. 125826, in the records of that Court.

instant case this Court has no discretion to decline equitable jurisdiction or to retain jurisdiction while awaiting State Court decision.

THE MERITS OF THE CONTROVERSY

In the remainder of this opinion, we will consider, first, the Constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with Federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C.J.S. pp. 713-714; *O'Brien vs. Equitable Society*, 212 F.2d 383; and See: *United States vs. Denver & R. G. Ry. Co.*, 191 U.S. 84; *Northern P. Ry. Co. vs. Lewis*, 162 U.S. 366; and *Morse vs. Fields*, 127 F.Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (*Williamson vs. Lee Optical Co.*, 348 U.S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the light of which the enactment is reasonable, then it is for the Legislature, not this Court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

CONSTITUTIONALITY OF THE CALIFORNIA LAW

A. Equal Protection

Plaintiffs contend that the California 8% oil content test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification. (See: *Phillips Chemical Co. vs. Dumas School District*, 361 U.S. 376). It is not enough that a classification by State law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (*Allied Stores of Ohio vs. Bowers*, 358 U.S. 522 and *Borden's Co. vs. Ten Eyck*, 297 U.S. 251). It is for the Legislature, not the Courts, to write the laws. The people, if the Legislature commits abuses, have their remedy at the polls (*Williamson vs. Lee Optical Co., supra*).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity. The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California Legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable

support for the decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (*St. John vs. New York*, 201 U.S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: *St. John vs. New York*, *supra*). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all avocados sold for human consumption. The general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable.[7]

Granting the possibility of a better law than the one devised by the California Legislative authorities, that does not require a finding that the law which *has* been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

[7] The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the Nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the State in interstate commerce (See: *Milk Board vs. Eisenberg Co.*, 306 U.S. 346; *Simpson vs. Shepard*, 230 U.S. 352). It is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (*Simpson vs. Shepard, supra*; *Mintz vs. Baldwin*, 289 U.S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (*Huron Cement Co. vs. Detroit*, 362 U.S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but

are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of *de minimis non curat lex.*

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this State of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this State have been marketed successfully after passing the California test.

Looking at the testimony of plaintiff's witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatemnt, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil requirement is not unconstitutional.

ALLEGED CONFLICT BETWEEN STATE AND FEDERAL LAW

The remaining question for the court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The Federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The Federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states, if they comply with the shipping dates established by the Federal Order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U.S.C. § 121).

The Federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69, or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any Federal law or order. For all that the Federal law declares, avocados grown in any state but Florida may

[8] At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with Federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the Federal Order. If the implication of Federal preemption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication should not lightly be made (*Cloverleaf Co. vs. Patterson*, 315 U.S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide field for the protection of consumers by the states by the appropriate exercise of the state police power (See: *Reid vs. Colorado*, 187 U.S. 137). The case would be different if the Federal Government had established a complete and uniform regulatory scheme which covered the whole problem (See: *Oreg.-Washington Co. vs. Washington*, 270 U.S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of *Mintz vs. Baldwin, supra*. In that case, the granting of a Federal certificate would have prevented the application of state inspection requirements, only because the Federal law there interpreted expressly so stated.

In *Cloverleaf Co. vs. Patterson, supra*, it was declared that where a Federal statute does not in specific terms prohibit state action, it must be clear that the Federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the Federal Government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this Court would be required to overrule *Cloverleaf Co. vs. Patterson, supra*. This, the Court has neither the power nor the inclination to do.

Both the State and the Federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority against seeking out conflict between state and Federal regulation, unless such conflict clearly exists *(Huron Cement Co. vs. Detroit, supra)*.

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any Federal law or regulation.

IT IS, THEREFORE, ORDERED that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

AND IT IS FURTHER ORDERED that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the Clerk of this Court pursuant to the applicable rules and statutes.

DATED: July ___, 1961

HOMER T. BONE
Senior Judge, United States Court of Appeals for the Ninth District.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER RE PLAINTIFFS' MOTION TO SUBSTITUTE AND RULING ON EVIDENCIARY MATTERS

Filed September 21, 1961

The above entitled action came on for trial on February 7 and 8, 1961, on the application of plaintiffs for permanent injunction, and the Court having reserved ruling on certain motions and evidenciary matters at the trial pending the filing of written argument of the parties, and written argument having been duly filed and considered by the Court, and the Court being fully advised, now therefore it is ORDERED:

1. Charles Paul, Director of Agriculture of the State of California, is substituted as a party defendant in the place of William E. Warne;

2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;

3. Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;

4. The Court reserves to defendants the right to introduce rebutting evidence at a further hearing should it be determined upon appeal and remand that

the plaintiffs' offer of proof described in paragraphs 2 and 3 herein should have been admitted into evidence;

5. Defendants' exhibits A, B, C, D, E and F are admitted into evidence, plaintiffs having raised no objection thereto.

Dated: September 20, 1961

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed September 21, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

FINDINGS OF FACT

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 195 .

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is effective in keeping off the market immature avocadoes of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Grow-

ers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

CONCLUSIONS OF LAW

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plaintiffs' application for such an injunction was properly heard before this three judge court under 28 U.S.C. 2281.

2. The Court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this Court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article 1, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated

pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby Ordered to be entered accordingly.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See Note Below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign these Findings of Fact and Conclusions of Law.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

JUDGMENT

Entered September 22, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law and being fully advised, it is ORDERED:

1. Plaintiffs take nothing;

2. Plaintiffs' request for permanent injunction is denied;

3. The action is dismissed on the merits;

4. Defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

---

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Judgment.

Entered in Civil Docket—September 22, 1961 . . .

APPENDIX B

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where

and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned, or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified

petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into the court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five

hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or re-marked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.*" The number of containers to be selected from any lot of avocados for the purpase of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better.

APPENDIX C

Act of March 3, 1911, 36 Stat. 1162

"Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. . . ."

28 U.S.C. 1253:

"DIRECT APPEALS FROM DECISIONS OF THREE-JUDGE COURTS.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an

interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. 2281:

"INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C. 2284:

"THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE.

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges

shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

LEGISLATIVE HISTORY OF 28 U.S.C. 2281

Following the decision in *Ex parte Young*, 209 U.S. 123 (1908), Congress enacted the Act of June 18, 1910, 36 Stat. 557, which prohibited the granting of an interlocutory injunction against a state statute upon grounds of federal unconstitutionality unless the application for injunction was heard and determined by a court of three judges. This 1910 statute was in 1911 codified into Section 266 of the Judicial Code, 36 Stat. 1162. In 1913, Section 266 was amended to apply to applications for interlocutory injunction against ad-

ministrative orders made pursuant to state statutes. Act of March 4, 1913, 37 Stat. 1013. To avoid the anomaly of a single judge reviewing the interlocutory decision of a three-judge court, the Act of February 13, 1925, 43 Stat. 938, extended the requirement of three judges to the hearing on the application for permanent injunction. The 1925 amendment authorized a direct appeal from either the interlocutory or permanent injunction. In *Smith* v. *Wilson*, 273 U.S. 388 (1927), the Court held that the three-judge procedure applied only where an application for an interlocutory injunction had been made and pressed. This judicial construction was changed by the Act of June 25, 1948, 62 Stat. 968, which made the three-judge requirement applicable indiscriminately on hearings for either interlocutory or permanent injunction. The 1948 amendment also divided former Section 266, Judicial Code, into 28 U.S.C. Secs. 2281 and 2284.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [redacted] 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants Cross-Appellees,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

Appellees Cross-Appellants.

Cross-Appeal from the United States District Court for the Northern District of California, Northern Division

CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 557

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants Cross-Appellees,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

Appellees Cross-Appellants.

Cross-Appeal from the United States District Court for the Northern District of California, Northern Division

CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellees and cross-appellants Charles Paul, Edmund G. Brown, and Stanley Mosk, hereinafter denoted appellees, cross-appeal to the Supreme Court of the United States, as follows:

From that portion of the judgment entered herein on September 22, 1961, which provides: "3. The action is dismissed on the merits;" Appendix p. 38.

OPINION BELOW

The opinion of the District Court for the Northern District of California, Northern Division, is printed in Appendix A, and is reported in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 197 F. Supp. 780 (1961). Copies of the Order Re Plaintiffs' Motion to Substitute and Ruling on Evidenciary Matters, filed September 21, 1961; Findings of Fact and Conclusions of Law, filed September 21, 1961; and the Judgment, entered September 22, 1961, are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U.S.C. 1331 and 1337 to enjoin enforcement of California Agricultural Code Section 792 as unconstitutional and in conflict with federal statute. Final judgment dismissing appellants' action was entered in the district court on September 22, 1961, and appellees' direct cross-appeal was timely filed in that court on November 3, 1961. 28 U.S.C. Sec. 2101(b).

Appellees will assert in their Motion to Dismiss, filed separately herein, that this court lacks jurisdiction of the case under 28 U.S.C. Sec. 1253. However, the Court may find that the judgment of the district court dismissing appellants' action falls within the appellate jurisdiction of this court. In this event ap-

pellees pray that the Court review the entire case and should correct the error of the district court in dismissing the action on the merits, instead of dismissing for lack of jurisdiction.

QUESTIONS PRESENTED

1. Whether the district court erred in dismissing the action on the merits instead of dismissing the action for want of jurisdiction.

2. Whether the district court erred in failing to dismiss the action as barred by the Eleventh Amendment to the United States Constitution.

3. Whether the district court erred in failing to dismiss for failure of appellants to establish a justiciable controversy.

STATUTES INVOLVED

The pertinent provisions of the California Statutes (Calif. Agr. Code, secs. 784, 785, 785.6, 792, 831) and of the California Regulations (3 Calif. Adm. C., secs. 1366.2 and 1397.6) are attached hereto as Appendix B.

STATEMENT

A district court convened pursuant to 28 U.S.C., secs. 2281 and 2284, dismissed appellants' action on the merits, after trial, by judgment entered September 22, 1961. Appellants' complaint had sought declaratory judgment and an injunction restraining the enforcement of Section 792, California Agricultural Code, on the ground of its invalidity under the federal

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, and as unconstitutional under the Commerce and Equal Protection Clauses of the United States Constitution.

Section 792 of the California Agricultural Code is part of a comprehensive statutory program establishing quality and maturity standards for a large number of agricultural products (see California Agric. Code, Div. 5, "Standardization," Secs. 751-1149.9, 3 Calif. Adm. Code, Secs. 1366-1478). Section 792 prescribed standards for avocados. This section provides in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." This 8 percent oil content standard for avocados was enacted into law by the California Legislature in 1925. Calif. Stats. 1925, Ch. 350, p. 633.

The district court found that (1) appellants neither suffered nor were threatened with irreparable injury and that appellants' evidence failed to establish a case within the equity jurisdiction of the district court, (2) that Section 792, Agricultural Code, is consistent with the provisions of the federal Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, and with the marketing regulations for avocados grown in South Florida issued thereunder, 7 C.F.R., Pt. 969, and (3) that Section 792, Agricultural Code, is consistent with the Commerce and Equal Protection clauses of the United States Constitution. Appendix p. 33.

In its Memorandum and Order, filed July 12, 1961, the district court stated, that while the appellants' evidence failed to establish a case within the equity jurisdiction of the district court, it was compelled to adjudicate the merits because of the language in the earlier remand of the Court. *Florida Lime and Avocado Growers* v. *Jacobsen,* 362 U.S. 73, 86 (1960). Appendix p. 21.

At the trial before the three-judge district court held February 7 and 8, 1961, appellants' case consisted of the testimony of Paul Louis Harding, Supervisory Plant Physiologist, United States Department of Agriculture. (Tr. 3.)[1] Mr. Harding testified to the horticultural nature of avocados grown in Florida and described the experimental work on avocados performed by the United States Department of Agriculture. (Tr. 2-97.)

Appellants at the trial also offered in evidence en masse the transcripts of depositions of five witnesses, together with the twenty-two exhibits attached thereto. (Tr. 29.) Upon appellees' objection, the court reserved decision on their admissibility. (Tr. 29.) After considering appellees' written objections, the court ruled that the depositions and exhibits were inadmissible in evidence. Appendix p. 31; Dkt. #110, pp. 12-50.[2] The three-judge court excluded Exhibit 23 for identification from evidence and reserved ruling on the

[1] Notation "Tr. _____" refers to partial reporter's transcript of the hearing February 7 and 8, 1961.

[2] Notation "Dkt. # _____" refers to the number marked in red on each document in the original record on appeal.

admissibility of appellants' exhibits for identification 24, 25 and 26. (Tr. 26, 69.) After considering appellees' written objections, the court thereafter ruled Exhibits 24, 25 and 26 to be inadmissible in evidence. Appendix p. 31; Dkt. #110, pp. 42-46. Appellants have not challenged the correctness of these evidenciary rulings in the Questions Presented in either their Notice of Appeal or in their Jurisdictional Statement. Dkt. #128; Appellants' Jurisdictional Statement, pp. 4 and 5.

The Honorable Homer T. Bone, United States Circuit Judge, Louis E. Goodman, United States District Judge, and Sherrill Halbert, United States District Judge, heard the evidence presented by the parties February 7 and 8, 1961, and signed the Memorandum Opinion of the court, filed July 12, 1961, which directed that appellees prepare findings, a form of judgment, and all other documents necessary to dispose of the action. Appendix p. 30. However, District Judge Louis E. Goodman died September 15, 1961, and was unable to sign the "Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters" and the "Findings of Fact and Conclusion of Law" filed September 21, 1961, nor the "Judgment" entered September 22, 1961. These Orders, Findings and Judgment were signed by United States Circuit Judge Homer T. Bone and by United States District Judge Sherrill Halbert. Appendix pp. 31-39.

Appellants did not seek leave to amend their complaint, nor did they petition for rehearing following the dismissal in the district court.

THE QUESTIONS ARE SUBSTANTIAL

I. The District Court Should Have Dismissed Appellants' Action for Want of Equity Jurisdiction.

Appellants' complaint alleged, and appellees' answers denied, that the appellees, or their agents, consistently barred the sale of appellants' avocados in California for failure uniformly to contain not less than 8 percent oil by weight, resulting in denial to appellants of access to the California markets and forcing the reshipment of the avocados to other adjoining states for sale, to the irreparable loss to appellants. Complaint, Dkt. #1; Answers, Dkt. #72 and #123. At the trial heard before the three-judge district court on February 7 and 8, 1961, appellants' evidence of injury was excluded from evidence, and was considered as an offer of proof only.[3] Appendix p. 31.

The district court in its opinion stated that it would have declined its discretionary equitable jurisdiction

[3] The various grounds for excluding the depositions and exhibits from evidence are discussed in Appellees' Trial Brief at pages 12 to 50. Dkt. #110, e.g. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.*, (9 Cir.), 264 F. 2d 199 (1959). Should the question of admissibility be reached, the offer of proof may only be considered for the purpose of determining whether error was committed to the prejudice of appellants in excluding this material from evidence. *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518 (1889). Appellees have reserved the right to present rebuttal evidence at any further hearing in the trial court. (Tr. 190-191; Appendix p. 31.)

but for the language in the judgment of this court directing that the controversy between the parties be "determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960); Appendix p. 21. Analysis of the previous appeal, though, discloses that the question of equity jurisdiction remained open to the district court for decision.

Appellees originally had moved in the trial court that appellants' action be dismissed on several grounds. The principal ground for the motion was that appellants had made an insufficient showing of injury to warrant the invocation of the district court's discretionary power to interfere with a state's enforcement in state courts of its own laws. After hearing oral argument, the district court on December 17, 1958, entered an order dismissing the complaint on the ground that it had no jurisdiction to decide the case because of the absence of a justiciable case or controversy within the meaning of Article III of the United States Constitution. In its order dismissing the action, the district court made it clear that it had no jurisdiction to hear the case, and could not therefore rule on the grounds presented in the motion to dismiss. The district court stated: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774, 776 (1958). Since the district court did not rule on the issue of equity jurisdiction raised by the motion to dismiss, and appellants did not raise the

issue in the Notice of Appeal or in their Jurisdictional Statement on Appeal, the issue of lack of equity jurisdiction was not considered on the previous appeal by this court. Appellants' Jurisdictional Statement, *Florida Lime Growers* v. *Jacobsen*, October Term 1959, #49, p. 6. This court in its opinion carefully observed this distinction, saying that the allegations of the appellants' complaint [4] were sufficient to show that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960). In short, the question whether appellants have shown facts establishing a case within the equity jurisdiction of the district court was part of the dispute between the parties and was still before that court after remand from this court. The district court in its findings entered September 21, 1961, found that "Plaintiffs' [appellants'] have neither suffered nor been threatened with irreparable injury and that plaintiffs' [appellants'] evidence fails to establish a case within the equity jurisdiction of this [District] Court." Appendix p. 36. Having found a lack of equity jurisdiction, the district court should not have reached the constitutional issues raised in appellants' complaint. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935);

[4] The allegations of appellants' complaint were accepted as true by appellee Jacobsen for the purposes of his motion to dismiss. Appellee's Brief, *Florida Lime Growers* v. *Jacobsen*, Oct. Term 1959, #49, p. 7.

Douglas v. *Jeannette,* 319 U.S. 157 (1943). By doing so, the district court decided a constitutional question when it was not necessary to do so, permitted a constitutional question to be raised by a litigant who was able to show no interest in its outcome, and decided a constitutional question, which upon the facts, was not presented for decision. The district court thereby erred in departing from the federal judicial policy of strict necessity in disposing of constitutional issues. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-571 (1947).

II. Appellants' Action Is Barred by the Eleventh Amendment to the United States Constitution.

There is no evidence in the record showing that either of the appellees Charles Paul, Director of Agriculture, Edmund G. Brown, Governor of California, or Stanley Mosk, Attorney General of California, nor any of their predecessors, have taken any action or threatened to take any action detrimental to appellants.

Appellees, as individuals, therefore have no personal interest in the subject-matter of the suit, and defend only as representing the state. The relief sought is against the appellees, not in their individual, but in their representative capacities as the executive officers of the State of California. The prayer in appellants' complaint is that appellees be restrained from proceeding in the state courts to enforce the state Agricultural Code. As a state can act only by its officers, an order restraining those officers from tak-

ing any steps by means of judicial proceedings to enforce the state Agricultural Code is one that restrains the state itself. The suit therefore is as much against the state as if the state were named as a party defendant on the record. While ". . . Congress has authority to direct the conduct of federal officers in proceedings brought . . . against them as such and may ordain that they may . . . be sued as representatives of the United States and stand in judgment on its behalf . . ., Congress is not so empowered as to state officers." *Ex parte La Prade*, 289 U.S. 444, 458 (1933). In the absence of proof of action, or the threat of action, hostile to appellants' interests, the appellees are not stripped of their representative character, and the suit becomes one against the state. *In re Ayers*, 123 U.S. 443, 505-506 (1887); *Ex parte Young*, 209 U.S. 123, 159-160 (1908). No threat of interference by appellees with rights of these appellants appears beyond that implied by the existence of the California statute and regulations. Appellants' action is solely to test the constitutionality of the state statute, in the enforcement of which appellees will act only by formal judicial proceedings in the courts of the state from which review may be obtained in this court in appropriate cases. While convenient to appellants, it is a mode of determining questions of constitutional law ". . . which cannot be applied to the state of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private

persons." *Fitts* v. *McGhee*, 172 U.S. 516, 530 (1899). Appellants' quarrel, therefore, is with the statute book, not with appellees, and appellants' action is barred by the Eleventh Amendment to the United States Constitution.[5] California cannot be interfered with in the performance of the public administration and, as it cannot be made a party, the action must fail.

III. No Justiciable Controversy Exists.

Appellant's complaint does allege facts constituting a justiciable controversy. This court so held on the previous appeal of this case. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960). But appellants failed to prove these allegations. Allegations in a complaint which are not supported in fact do not create a justiciable controversy. *Poe* v. *Ullman*, 367 U.S. 497, 501-502 (1961), appeal from state court judgment dismissed.

Allegedly there is a controversy over the application of California's 8 percent oil standard to appellants' avocados. There is no evidence, however, that any of appellants' shipments of avocados to California were ever rejected as not meeting the 8 percent oil standard. Nor is there any evidence that appellants' have refrained from shipping avocados to California because of the 8 percent oil standard. The judicial power does not include the rendering of advisory opinions on hypothetical situations. *United Public*

[5] Amendment Eleven, United States Constitution, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of United States by citizens of another state. . . ."

Workers v. *Mitchell*, 330 U.S. 75, 86-91 (1947), appeal from United States District Court, judgment dismissing action affirmed; *Poe* v. *Ullman*, 367 U.S. 497, 501-502 (1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below be vacated with directions that the action be dismissed for want of jurisdiction.

Respectfully submitted,

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December, 1961

APPENDIX A

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

MEMORANDUM AND ORDER

Filed July 12, 1961

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal Protection Clauses of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U.S.C. §601 *et seq.*) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states. California has a law (California Agricultural Code, § 792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This Court initially dismissed the action for want of a present, actual case or controversy (*Florida Lime*

[1] The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25(d)).

& Avocado Growers vs. Jacobsen, 169 F.Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (*Florida Lime & Avocado Growers vs. Jacobsen*, 362 U.S. 73).

The case has now been heard by a three-judge Court, pursuant to the provisions of Title 28 U.S.C. §§ 2281 and 2284. The evidence has been heard, with the rulings on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the Court for its determination.

The Court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the Court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification.[2]

THE FACTS

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties. Florida grows principally

[2] It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See: pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this State contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant aftertaste. If they are picked when mature, they ripen while softening, and become palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and

[3] Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the

age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most

immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not *per se* bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste.[4] Defendants offered testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this Court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

[4] It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit (That is, the test might be made only on fruit which had given physical indications during softening that it was mature.).

EQUITABLE JURISDICTION

A Court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction suspending the enforcement of the laws of the State of California.[5] If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: *Watson vs. Buck*, 313 U.S. 387; *A.F. of L. vs. Watson*, 327 U.S. 582).

If the Court were required to take equitable jurisdiction of the instant case, coming before this Court for the first time, it might well be advisable for the Court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California Courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento.[6] (See: *A.F. of L. vs. Watson, supra*).

This case is now before this Court, however, with a mandate from the United States Supreme Court, directing this Court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This Court concludes, therefore, that in the

[5] For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of *Florida Lime & Avocado Growers vs. Jacobsen, supra*, at 362 U.S. 77.

[6] Case No. 125826, in the records of that Court.

instant case this Court has no discretion to decline equitable jurisdiction or to retain jurisdiction while awaiting State Court decision.

THE MERITS OF THE CONTROVERSY

In the remainder of this opinion, we will consider, first, the Constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with Federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C.J.S. pp. 713-714; *O'Brien vs. Equitable Society*, 212 F.2d 383; and See: *United States vs. Denver & R. G. Ry. Co.*, 191 U.S. 84; *Northern P. Ry. Co. vs. Lewis*, 162 U.S. 366; and *Morse vs. Fields*, 127 F.Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (*Williamson vs. Lee Optical Co.*, 348 U.S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the light of which the enactment is reasonable, then it is for the Legislature, not this Court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

CONSTITUTIONALITY OF THE CALIFORNIA LAW

A. Equal Protection

Plaintiffs contend that the California 8% oil content test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: *Phillips Chemical Co. vs. Dumas School District,* 361 U.S. 376). It is not enough that a classification by State law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (*Allied Stores of Ohio vs. Bowers,* 358 U.S. 522 and *Borden's Co. vs. Ten Eyck,* 297 U.S. 251). It is for the Legislature, not the Courts, to write the laws. The people, if the Legislature commits abuses, have their remedy at the polls (*Williamson vs. Lee Optical Co., supra*).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity. The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California Legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable

support for the decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (*St. John vs. New York*, 201 U.S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: *St. John vs. New York, supra*). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all avocados sold for human consumption. The general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable.[7]

Granting the possibility of a better law than the one devised by the California Legislative authorities, that does not require a finding that the law which *has* been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

[7] The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the Nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the State in interstate commerce (See: *Milk Board vs. Eisenberg Co.*, 306 U.S. 346; *Simpson vs. Shepard*, 230 U.S. 352). It is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (*Simpson vs. Shepard, supra*; *Mintz vs. Baldwin*, 289 U.S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (*Huron Cement Co. vs. Detroit*, 362 U.S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but

are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of *de minimis non curat lex.*

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this State of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this State have been marketed successfully after passing the California test.

Looking at the testimony of plaintiff's witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatemnt, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil requirement is not unconstitutional.

ALLEGED CONFLICT BETWEEN STATE AND FEDERAL LAW

The remaining question for the court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The Federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The Federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states, if they comply with the shipping dates established by the Federal Order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U.S.C. § 121).

The Federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69, or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any Federal law or order. For all that the Federal law declares, avocados grown in any state but Florida may

[8] At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with Federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the Federal Order. If the implication of Federal preemption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication should not lightly be made (*Cloverleaf Co. vs. Patterson*, 315 U.S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide field for the protection of consumers by the states by the appropriate exercise of the state police power (See: *Reid vs. Colorado*, 187 U.S. 137). The case would be different if the Federal Government had established a complete and uniform regulatory scheme which covered the whole problem (See: *Oreg.-Washington Co. vs. Washington*, 270 U.S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of *Mintz vs. Baldwin, supra.* In that case, the granting of a Federal certificate would have prevented the application of state inspection requirements, only because the Federal law there interpreted expressly so stated.

In *Cloverleaf Co. vs. Patterson, supra,* it was declared that where a Federal statute does not in specific terms prohibit state action, it must be clear that the Federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the Federal Government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this Court would be required to overrule *Cloverleaf Co. vs. Patterson, supra.* This, the Court has neither the power nor the inclination to do.

Both the State and the Federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority against seeking out conflict between state and Federal regulation, unless such conflict clearly exists *(Huron Cement Co. vs. Detroit, supra).*

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any Federal law or regulation.

IT IS, THEREFORE, ORDERED that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

AND IT IS FURTHER ORDERED that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the Clerk of this Court pursuant to the applicable rules and statutes.

DATED: July ___, 1961

HOMER T. BONE
Senior Judge, United States Court of Appeals for the Ninth District.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

ORDER RE PLAINTIFFS' MOTION TO SUBSTITUTE AND RULING ON EVIDENCIARY MATTERS

Filed September 21, 1961

The above entitled action came on for trial on February 7 and 8, 1961, on the application of plaintiffs for permanent injunction, and the Court having reserved ruling on certain motions and evidenciary matters at the trial pending the filing of written argument of the parties, and written argument having been duly filed and considered by the Court, and the Court being fully advised, now therefore it is ORDERED:

1. Charles Paul, Director of Agriculture of the State of California, is substituted as a party defendant in the place of William E. Warne;

2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;

3. Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;

4. The Court reserves to defendants the right to introduce rebutting evidence at a further hearing should it be determined upon appeal and remand that

the plaintiffs' offer of proof described in paragraphs 2 and 3 herein should have been admitted into evidence;

5. Defendants' exhibits A, B, C, D, E and F are admitted into evidence, plaintiffs having raised no objection thereto.

Dated: September 20, 1961

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed September 21, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

FINDINGS OF FACT

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is effective in keeping off the market immature avocadoes of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Grow-

ers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

CONCLUSIONS OF LAW

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plaintiffs' application for such an injunction was properly heard before this three judge court under 28 U.S.C. 2281.

2. The Court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this Court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated

pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby Ordered to be entered accordingly.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See Note Below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign these Findings of Fact and Conclusions of Law.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

JUDGMENT

Entered September 22, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law and being fully advised, it is ORDERED:

1. Plaintiffs take nothing;

2. Plaintiffs' request for permanent injunction is denied;

3. The action is dismissed on the merits;

4. Defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Judgment.

Entered in Civil Docket—September 22, 1961 . . .

APPENDIX B

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where

and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified

petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into the court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such non-complying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five

hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or re-marked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpase of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 45

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM, ALSO MOTION TO DISMISS THE CROSS-APPEAL

Isaac E. Ferguson
13016 Victory Boulevard
North Hollywood, California

Attorney for appellants.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 557

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM, ALSO MOTION TO DISMISS THE CROSS-APPEAL

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Attorney for appellants.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 557

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM, ALSO MOTION TO DISMISS THE CROSS-APPEAL

Appellees are prosecuting a cross-appeal from "that portion of the judgment entered herein on September 22, 1961, which provides: 'The action is dismissed on the merits.'". At

the same time, in their motion to dismiss the appeal, appellees urge that this court lacks jurisdiction of the appeal because the case was not within the "equity jurisdiction" of the district court.

The district court, as directed by this court on the prior appeal, heard and passed upon the case "on the merits." It was not error to obey the mandate of this court. The statement by the court that it might have disposed of the case in some other manner, if not precluded by the mandate of this court, is immaterial. Such statement does not negate the fact that the district court did exercise "jurisdiction of the subject matter of this suit and of the parties," by hearing the case and denying the relief prayed for by appellants. The district court having exercised jurisdiction to pronounce its judgment in the case, this court is empowered to review the judgment.

Three-judge court

Appellees contend further that this court lacks jurisdiction of the appeal because his honor, Judge Louis E. Goodman, one of the members of the three-judge district court, died September 15, 1961, and was therefore unable to sign the judgment. (Appellees' motion, p. 51.)

The contention is trivial. Trial of the case was held February 7 and 8, 1961, the three judges participating. The decision of the court was announced by the "Memorandum and Order" of the court dated July 12, 1961, signed

by the three judges. (Appellants' Jurisdictional Statement, " Appendix I.) Proposed findings and conclusions, prepared by the attorneys for the appellees, were submitted to the attorney for appellants on August 1, 1961, together with a proposed judgment order and proposed "Order re plaintiffs' motion to substitute and ruling on evidentiary matters. " Objections of plaintiffs to the proposed findings, conclusions and orders were filed August 4, 1961. On August 7, 1961, appellees filed a reply to appellants' objections. (Docket item No. 118, wherein it is also noted that on August 10, the proposed findings, conclusions and orders were lodged with the clerk.) Thus, the proposed findings, conclusions and judgment were before the court for a period of five weeks or more prior to the death of Judge Goodman. The notation by the court that Judge Goodman was unable to sign the documents because of his death does not indicate that he did not participate in the determinations made by the court.

Substantiality of the questions presented by the appeal

The present appeal brings before the court the same pleadings and evidence considered on the former appeal, together with additional evidence. The question of the substantiality of appellants' complaint was argued extensively in the briefs on the former appeal. (Appellants' brief, pp. 6-24, 42-51; Appellees' brief, pp. 3-8, 14-15, 29-34.) It was decided by this court that the claims asserted by appellants are substantial in nature. Upon the trial of the case after remandment, there was no refutation

of any of the evidence supporting the substantiality of appellants' complaint. Such refutation is not made by a bare finding (No. 13), unsupported by substantial evidence, that appellants have neither suffered nor been threatened with irreparable injury. No suggestion is made that there is available to appellants an effective remedy at law, rather than in equity. To treat as de minimus the past and prospective damage to appellants caused by arbitrary debarment of sale of their avocados in California is to flaunt the national policy manifested in the commerce clause of the federal constitution and in section 1337 of the Judicial Code.

Post-trial ruling on evidence

In the anomalous post-trial "Ruling on evidentiary matters" (Appellees' motion, pp. 43-44), it is declared that the depositions of the witnesses David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, also plaintiffs' exhibits 1 through 26, "are not admitted into evidence but have been considered by the court as an offer of proof by plaintiffs."

Upon the trial of the case, said depositions and exhibits were tendered and received in evidence, in no instance as "an offer of proof," with leave to appellees to make objections thereto in their post-trial memorandum. (Transcript of trial proceedings, pp. 28-29, 69, 189-191.) The final pronouncement by the presiding judge was: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if

it is necessary."

Appellees, in their post-trial memorandum, objected to the admissibility of the depositions in toto on the ground that it was not shown that the witnesses resided more than 100 miles away from the place of trial. The place of trial was Sacramento, California, and it appeared in the depositions of appellants' witnesses David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty that they resided in towns south of Miami, Florida. Furthermore, the depositions (including that of R. M. Wimbish, called by appellees) were taken pursuant to stipulation, invoked by appellees on their motions to dismiss the complaint, designated both by appellants and appellees as part of the record of the case upon the appeal to this court from the judgment of dismissal entered by the district court January 13, 1959. (No. 49, October Term, 1959.) Objections in detail were made also by appellees to the admissibility of various questions and answers in the depositions and to various exhibits introduced by appellants.

Answer to appellees' objections was made in the closing memorandum filed by appellants. The court, in its "Memorandum and Order" of July 12, 1961, stated: "The evidence has been heard, with the rulings on certain objections by defendants having been reserved. . . The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume,

arguendo, that the exhibits and depositions offered by plaintiffs are all admissible." (Appellants' Jurisdictional Statement, pp. 18-19.)

Without attempt to construe the court's enigmatic statement, two things are clear: (1) that the court did not sustain any of appellees' objections to the admissibility of the depositions, in whole or in part, or to the admissibility of any of appellants' exhibits; (2) that the court gave such consideration as it deemed necessary to all of said evidence. Since objections to the admissibility of evidence that are not ruled upon by the court are in effect overruled, the record is devoid of support for the post-trial declaration that the depositions and exhibits to which objection was made "are not admitted in evidence." Appellees state in their motion to dismiss (p. 6) that appellants do not contest the correctness of the ruling of the trial court excluding certain exhibits from evidence, but fail to indicate any ruling by the court on appellees' objections to the admissibility of the specified exhibits. *

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* It is erroneously stated by appellees (Motion, p. 5) that exhibit 23 was excluded from evidence. When the exhibit was marked for identification, but before it was offered in evidence, the presiding judge interjected: "We are not going to encumber the record with things like this, so I will sustain the objection that was made to this exhibit," no objection then having been made. (Transcript of trial

(Continued)

The cross-appeal

The questions presented on the cross-appeal (Cross-Appellants' Jurisdictional Statement, p. 3) have already been adjudicated by the court, wherefore appellants submit that the cross-appeal should be forthwith dismissed.

Respectfully submitted,

Isaac E. Ferguson,

Attorney for appellants.

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* (Continued)

proceedings, p. 31.) When plaintiffs' exhibit 23 was offered in evidence, along with exhibits 24, 25 and 26, the presiding judge announced: "We will reserve ruling on that." (Transcript, p. 69.) The objections of appellees' to exhibits 23, 24, 25 and 26, made in appellees' post-trial memorandum and answered in appellants' closing memorandum, were never ruled upon by the court.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 45

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

Appeal From the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' BRIEF.

Opinions of District Court

This is the second appeal to this court in this action. The opinion of the District Court considered on the previous appeal is reported in 169 F. S. 774. Upon reversal of the former judgment of the District Court and remandment of the case for further proceedings (80 S. Ct. 568), the District Court after further hearing of the case rendered the opinion reported in 197 F. S. 780. (R. 757-769.)

Jurisdiction of the case

Jurisdiction of the District Court was invoked under Secs. 1331 and 1337 of the Judicial Code (28 U. S. C. A. 1331 and 1337). A three-judge District Court was convened to hear the case in accordance with Secs. 2281 and 2284 of the Judicial Code (28 U. S. C. A. 2281 and 2284.) Judgment adverse to appellants from which the present appeal was taken was entered September 22, 1961 (R. 783) and notice of appeal from said judgment was filed by appellants in the office of the clerk of the United States District Court for the Northern District of California, Northern Division, on October 10, 1961 (R. 788). Direct appeal to this court from said judgment was taken pursuant to Sec. 1253 of the Judicial Code (28 U. S. C. A. 1253.)

An order noting probable jurisdiction of the appeal was entered January 15, 1962. (82 S. Ct. 439; R. 795.)

Constitutional provisions, statutes and regulations involved

The constitutional provisions herein involved are Sec. 8(3) of Article I of the Constitution of the United States, empowering Congress to regulate commerce with foreign nations and among the several states, the provision of Sec. 1 of Article XIV of Amendments that no state shall deny to any person within its jurisdiction the equal protection of the laws, and Sec. 2 of Article VI, providing that the constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the

constitution or laws of any state to the contrary notwithstanding.

The federal statute involved is the Agricultural Marketing Agreement Act of 1937, pursuant to which the Secretary of Agriculture of the United States has promulgated Florida Avocado Order No. 69 to govern the marketing in interstate commerce of the avocados grown in South Florida. (7 U. S. C. A. 601, 602, 608, 608b, 608c, 608e, *infra*, pp. 88-95; Florida Avocado Order No. 69, R. 15.) Since said marketing order became effective on June 14, 1954, numerous regulations with respect to the maturity and quality of the avocados permitted to be marketed thereunder have been issued by the Secretary of Agriculture and published in the Federal Register. Reference to these regulations is made in appellants' statement of the case and argument.

The state statute involved is Sec. 792 of the Agricultural Code of California (Deering's California Codes, Agriculture, 1962 edition; also enforcement provisions, Secs. 784, 785, 785.6, 790, 831, *infra*, pp. 83-87)

Questions presented for review

(1)

Congress having exercised its power to regulate commerce with foreign nations and among the several states by enacting the Agricultural Marketing Agreement of 1937, and valid orders and regulations having been issued pursuant to said Act by the Secretary of Agriculture establishing standards of maturity and quality to govern the interstate marketing of the avocados grown in South Florida, may the state officers of California—in face of the Supremacy Clause of the

Constitution—disregard the certification of such avocados, under said Act and regulations, as of requisite maturity and quality for interstate marketing and, in lieu thereof, require such avocados to meet another and different standard of maturity and quality as a condition precedent to the marketing of the fruit in California?

(2)

Does not the Commerce Clause of the Constitution, even without implementation by action of Congress, preclude inhibition of sale in California of avocados grown in Florida, and shipped in interstate commerce, solely on the ground that such avocados have less than the 8% oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados of their nature and conditions of growth mature with less than 8% oil content and are not for that reason deleterious, inimical to health, unpalatable, or of inferior quality?

(3)

Since the avocados produced in Florida are predominantly of varieties that attain maturity with less than 8% oil content, but are not for that reason of lesser healthfulness or palatability than avocados with 8% or greater oil content, while the avocados produced in California are predominantly of varieties with oil content far in excess of 8%, and since the practical effect of application of California's 8% oil requirement to the Florida avocados shipped for sale in that state is to impede the effective marketing of the Florida fruit in California, to the commercial advantage of the growers and handlers of the avocados produced in California, does not such arbitrary and invidious discrim-

ination deny to the shippers of the Florida fruit the equal protection of the laws commanded by the Fourteenth Amendment of the United States Constitution?

Statement of the case

Nature of action: The appellants, handlers of avocados grown in Florida and marketed in interstate commerce, brought this action for declaratory judgment and injunction to restrain further enforcement against them by the state officers of California of Sec. 792 of the Agricultural Code of California, barring sale in that state of all avocados which, at the time of picking and at all times thereafter, contain less than 8% of oil, by weight of the avocado excluding skin and seed. R. 8; also Appendix, *infra*, p. 87.)

Jurisdiction of the District Court was invoked under Sec. 1331 of the Judicial Code, on the ground that enforcement of said state statute to bar sale in California of avocados grown in Florida and shipped in interstate commerce, solely because such avocados have less than 8% oil content, is in derogation of Article I, Sec. 8(3) of the Constitution of the United States, also the Equal Protection clause of the Fourteenth Amendment. (Complaint, paragraph III, R. 2.) Jurisdiction of the action was invoked also under Sec. 1337 of the Judicial Code, for the reason that enforcement of said state statute to bar sale of Florida avocados in California conflicts with federal regulation of the marketing of the Florida avocados, by the Agricultural Marketing Agreement Act of 1937 and the orders and regulations issued pursuant to said Act by the Secretary of Agriculture of the United States. (Complaint, paragraph IV, R. 3-4.)

Prior judgment and appeal: The three-judge District Court, on motion of the defendants based upon the pleadings and the depositions and answers to interrogatories then on file, dismissed the action for want of jurisdiction. On the prior appeal to this court, said judgment was reversed and the case was remanded to the District Court for further proceedings not inconsistent with the opinion of this court. (*Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73, 80 S. Ct. 568.)

Second judgment and appeal: Upon trial of the case pursuant to the order of remandment, the District Court dismissed the complaint on the merits. (R. 757, 783.) The present appeal is from this judgment.

FACTS OF THE CASE MATERIAL TO THE QUESTIONS PRESENTED

The Florida avocado industry

The avocado is a tropical and sub-tropical fruit, introduced commercially in the United States during the first decade of this century, grown since then commercially only in southern areas of Florida and California. Description of the fruit is complicated by the multiplicity of varieties, differing radically in shape, size, type and color of skin and flesh, season of growth, oil or fat content and other attributes. Those grown in the two states are of different origin and varieties. The California avocados trace back to seeds or cuttings imported from the high altitudes of Mexico and Guatemala, while the Florida avocados have as their antecessors seeds from the West Indies and lowlands of Guatemala. Hybrids between the West Indian and

Guatemalan races have originated in Florida, propagated there by budding and grafting, and now comprise an important portion of the commercial production, notably the Lula, Booth 7 and Booth 8 varieties.

Until about 1940, the avocado acreage in Florida was relatively static, no more than about 2,000 acres. Then began heavy planting of trees that by 1950 augmented the avocado area to about 11,000 acres and the annual crop from 100,000 bushels to about 600,000 bushels, with many of the recently planted trees yet to come into fruition. (R. 254.) Impetus to this increased production came from developments which made feasible the marketing of the fruit throughout the country, such as pre-cooling facilities in the newer packing houses, transportation by refrigerated trucks, betterment of highways, refrigerated storage at point of arrival.

With the upsurge in production, unaccompanied by either state or federal regulation of the marketing of the fruit, self-regulation by the growers and handlers proved inadequate to keep immature and inferior avocados from the market. To protect the industry from threatened deterioration, growers and handlers of the fruit petitioned the Secretary of Agriculture to come to their aid by exercising the authority vested in him by the Agricultural Marketing Agreement Act of 1937 to enter into a proposed marketing agreement under which satisfactory standards of maturity and quality would be imposed on the marketing of the fruit. Upon public hearings, as provided by the Act, the Secretary made findings: that 80% to 90% of the avocados grown in Florida are sold in markets outside the state; that all handling of avocados grown in the Florida

production area is in the current of interstate and foreign commerce, or directly affects such commerce; that sale of avocados that are immature and otherwise of poor quality has tended to reduce the demand and prices for Florida avocados; that the situation could be remedied by imposition of official standards of quality and maturity, under a marketing agreement and order, as a condition precedent to the marketing of Florida avocados. (Findings and decision of Secretary of Agriculture, April 24, 1954 and May 14, 1954, 19 F. R. 2418 and 2784; R. 3-4.)

The proposed marketing agreement was duly executed by the requisite number of handlers of avocados grown in South Florida and approved by referendum vote of the producers for market, in the period from April 1, 1953 through March 31, 1954, of at least two-thirds of the volume of avocados represented in such referendum, whereupon the proposed marketing agreement became effective June 11, 1954. (Marketing Order No. 969, referred to as No. 69, 19 F. R. 3439; 7 C. F. R. part 969, pp. 119-131 and Suppl. pp. 14-18;—Exhibit "A" to complaint, R. 15-33.)

Since the 1954-55 crop season, shipment of avocados from Florida has been permitted only after inspection of the fruit by the joint inspection service of the U. S. Department of Agriculture and the Florida Department of Agriculture and issuance of a certificate of compliance with the maturity and quality regulations promulgated from time to time by the Secretary of Agriculture under the general marketing order of June 11, 1954. (Pl. Ex. 3, R. 355; also R. 151-152, 315-316, 349-350.)

Maturity and quality regulations under federal marketing order

In each crop year (from April 1 to March 31 of the ensuing year), maturity regulations are issued by the Secretary of Agriculture fixing the time of the year when the different varieties of Florida avocados may be picked and shipped. Picking dates are recommended to the Secretary by the Avocado Administrative Committee composed of growers and handlers, organized pursuant to the general marketing order. Meetings of the committee are attended by representatives of the Department of Agriculture. (R. 207.) The recommendations adopted by the committee are sent to the Secretary and his staff for consideration and official action.

Each year since 1954, permissible dates for picking and shipping some 40 varieties of Florida avocados have been established by orders of the Secretary, published in the Federal Register. (R. 622-623.) For each variety, in each year, permissible picking dates are specified in relation to the attainment by the fruit of stated minimum weight, or minimum diameter: an "A" date, with highest weight requirement; a "B" date, generally about two weeks later, with somewhat lower weight requirement; a "C" date, another two weeks later, with a further decrease in weight requirement; a final "D" date, when the undisposed of balance of the variety may be picked and shipped without minimum weight restriction. (For illustration, see Pl. Ex. 9, a summary of the official picking dates in the 1957-58 season, R. 364.)

Oil content of the avocados—the exclusive criterion of maturity under Sec. 792 of the Agricultural Code

of California, with minimum requirement of 8% oil content—does not enter into determination of maturity of any of the Florida avocados; instead, as above stated, only correlation of picking dates with attained weight or diameter. (R. 594-596.)

Quality regulations, in addition to the maturity regulations, have also been issued by the Secretary from time to time, such as exhibit "C" attached to the complaint. (R. 36.) Here, also, oil content is not a factor.

That oil content is not a valid determinant of maturity and quality of Florida avocados, and that maturity and good quality of the fruit is assured by enforcement of the standards established under the Florida marketing order, is shown by the testimony of Dr. Roy W. Harkness and Dr. Paul L. Harding, here summarized.

Testimony of Dr. Roy W. Harkness

Dr. Harkness, of the University of Florida, has been engaged since 1946 in various chemical research projects at the Sub-Tropical Experiment Station of the university in Homestead, Florida. He received his degree of Ph.D. in Physical Chemistry at the University of California in 1928; worked for the Department of Agriculture in its Washington research laboratories for about seven years, then for about eleven years in the research department of Houdry Products Corporation of Pennsylvania. (R. 208-209.)

In the fall of 1951, he undertook a research project, called State Project 675, on the subject of the maturity of Florida avocados, a study conducted through four crop years. (R. 209-210.) In the early period of this

research project, principal consideration was given to the measure of oil content as a possible determinant of maturity of the Florida avocados. Oil tests were made of a great many avocados taken from groves in the Homestead Sub-Tropical Experiment Station and from various commercial groves in and around Dade County. The avocados used in the research project were selected by Dr. Harkness personally. (R. 210, 224.) Likewise, the oil tests were made by Dr. Harkness himself or under his supervision. (R. 214.) The method used to measure oil content was essentially the same as the method used in California. (R. 210-211, 243-246.) The results of the oil tests were recorded by Dr. Harkness, in books produced upon the taking of his deposition, and photostatic copies of the relevant pages of these books, together with a typewritten summary of selected oil tests prepared for publication, were collectively made part of the deposition as plaintiffs' exhibit 16. (R. 389-437; 211-213.)*

Dr. Harkness testified that the real measure of maturity of the avocado is the quality of the fruit as judged by the people who eat it, that it is just a matter of having a fruit that is enjoyable to eat and at the same time has a satisfactory food value; that no correlation was found between oil content and quality of the fruit, when all of the different varieties

*Plaintiffs' exhibit 16 shows also the results of oil tests made at the Experiment Station, at request of various growers and handlers of the avocados, after the conclusion of the research project early in 1955. These subsequent oil tests, made as a public service to growers and handlers of the fruit who desired to make shipments to California and sought to ascertain whether such shipments could be risked in face of California's 8% oil content requirement, were not considered by Dr. Harkness in arriving at his conclusions. (R. 163-165, 218-219, 248.)

were considered together, since several of the earlier varieties matured to a satisfactory quality at a point of time at which the oil content was in the range of 3% to 6%, while some of the late maturing varieties did not reach edible condition until the oil content was comparatively high, perhaps 7% to 8% or even higher. (R. 215-218.)

As to avocados of the same variety, serious difficulty was found in use of oil content as a measure of maturity because of the variability in oil content of samples of the fruit taken at the same time from different groves, or from different trees in the same grove, or even from the same side of a single tree. Fruit that looked alike, taken from the same part of a tree, showed a difference of 3% in oil content, but no difference in flavor. (R. 216, 239-240.)

Difference in oil content of the avocados was not traceable to difference in horticultural methods. Great variations were found in oil content of avocados of the same variety taken from different groves where the same fertilizers were used and the spray treatment was identical. (R. 217.) Conversely, no relation was found between oil content and use of a different fertilizer. (R. 217.) These variations in oil content of avocados of the same variety, taken at the same time from different groves, or from different trees in the same grove, or even from the same tree, remain unexplained. (R. 217.)

Results of oil tests in State Project 675, in relation to marketing of the fruit

The great number of oil tests of Florida avocados made in the research project conducted by Dr. Harkness reveal, incidentally, the arbitrariness of the California 8% oil content standard in application to the Florida avocados. For illustration, a summary is submitted of the oil tests made in the 1953-54 and 1954-55 seasons of eight commercial varieties of Florida avocados, accounting for approximately 80% of the annual crop, in relation to the marketing season for the respective varieties. (Oil tests—Pl. Ex. 16, R. 389-418.)

Pollock

The Pollock, a prime representative of the early summer varieties of Florida avocados, is marketed from the first of July to about the end of August. (Pl. Ex. 4, 7, 9 and 14, deposition of David M. Biggar, R. 356, 361, 364, 379.)

1953-54:

Oil tests of 74 samples of Pollock avocados,* made from July 6 to August 12, 1953, showed oil content ranging from 1.6% to 3.3%. (No further oil tests of Pollocks were made in the 1954-55 season.)

Waldin

The Waldin is the most important commercially and latest in maturity of the Florida avocados of West Indian origin. The marketing period of the Waldin begins in the latter part of August and extends to the forepart of October. (R. 356, 361.)

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*The oil tests, in most instances, were of composite samples of 10 avocados, selected for uniformity of size. (R. 219, 431.)

The Waldin oil tests:

1953-54:

Tests of 75 samples of Waldins, July 27 to September 22, 1953, oil 2.1% to 6.1%.

1954-55:

Tests of 23 samples, July 20 to September 8, 1954, oil 3.2% to 5.0%.

Booth 8

The Booth 8, most highly favored of the series of West Indian-Guatemalan hybrids originated by Will Booth, second in volume of production among all Florida avocados in the four seasons from 1955-56 through 1958-59, and first in 1959-60 (Deft. Ex. E, R. 488-492), is of constantly increasing commercial importance. Shipment of this variety to California has never been ventured.

The marketing period of the Booth 8 begins about the middle of September and is at its height in October and November, with minor holdover in December. (R. 356, 361.)

The Booth 8 oil tests:

1953-54:

53 tests from August 12 to September 30, 1953, oil 2.7% to 5.9%.

24 tests, October 1 to 30, 1953, oil 4.4% to 6.8%.

28 tests, November 7 to 25, 1953, oil 4.7% to 8.4%, 26 under 8%.

3 tests, December 3 and 16, 1953, oil 8.3%, 9.3% 8.8%.

1954-55:

31 tests, August 16 to September 30, oil 3.2% to 6.2%.

16 tests, October 5 to November 10, oil 5.1% to 7.1%.

Lula

The Lula, also a West Indian-Guatemalan hybrid, was until the 1959-60 season the leading Florida avocado in volume of production, with the longest marketing period. Shipments of Lulas begin early in October and are heaviest in November, December and January, with a residue in February and March. (R. 356, 361.) Substantially all shipments of Florida avocados to California have been Lulas. (R. 257, 438-439, 443-444.)

The Lula oil tests:

1953-54:

127 tests, August 12 to September 30, 1953, oil 2.3% to 7.9%.

91 tests, October 1 to 30, 1953, oil 4.9% to 11.0%, 78 under 8%.

101 tests, November 2 to 30, 1953, oil 5.4% to 11.3%, 58 under 8%.

88 tests, December 2, 1953 to January 13, 1954, oil 4.5% to 13.1%, 32 under 8%.

1954-55:

30 tests, August 24 to September 28, 1954, oil 2.9% to 5.7%.

85 tests, October 4 to 29, 1954, oil 4.7% to 9.2% 75 under 8%.

44 tests, November 1 to 30, 1954, oil 5.7% to 9.6%, 28 under 8%.

21 tests, December 6, 1954 to January 11, 1955, oil 7.1% to 12.9%, 4 under 8%.

Booth 7

The Booth 7, next to the Booth 8 and Lula in commercial importance, is marketed from about the middle of October to the middle of December. (R. 356, 361.)

The Booth 7 oil tests:

1953-54:

27 tests, September 9 to October 14, 1953, oil 3.2% to 6.9%.

49 tests, October 16 to 30, 1953, oil 4.2% to 8.3%, 46 under 8%.

60 tests, November 2 to 23, 1953, oil 4.1% to 11.1%, 45 under 8%.

34 tests, December 1 to 16, 1953, oil 6.4% to 12.0%, 10 under 8%.

1954-55:

10 tests, September 15 to October 12, 1953, oil 3.8% to 6.5%.

22 tests, November 2 to 30, 1953, oil 4.1% to 9.8%, 12 under 8%.

6 tests, December 6 to 14, 1954, oil 5.0% to 10.9%, 2 under 8%.

Hickson

The Hickson, another hybrid, is marketed in small volume in the latter part of October, but mainly in the month of November and the forepart of December. (R. 356, 361.)

The Hickson oil tests:

1953-54:

10 tests, September 29 to October 30, 1953, oil 5.8% to 7.4%.

6 tests, November 12 to December 4, 1953, oil 6.9% to 10.0%, 3 under 8%.

1954-55:

13 tests, September 22 to November 10, 1954, oil 6.7% to 9.6%, 9 under 8%.

Booth 1

The Booth 1, of lesser commercial importance than the Booth 8 and Booth 7, has a marketing period beginning about the end of November and running into January. (R. 356, 361.)

The Booth 1 oil tests:

1953-54:

9 tests, October 22 to December 16, 1953, oil 7.5% to 10.9%, 2 under 8%.

1954-55:

11 tests, November 1 to December 14, 1954, oil 8.0% to 11.7%.

Taylor

The marketing period of the Taylor, an avocado of the Guatemalan race, begins about the middle of November and continues through February. (R. 356, 361.) Production of this variety averages less than 3½% of the annual Florida crop. (Deft. Ex. E, R. 488-492.)

The Taylor oil tests:

1953-54:

21 tests, October 22 to November 18, 1953, oil 6.1% to 9.9%, 12 under 8%.

18 tests, November 24, 1953 to January 13, 1954, oil 7.4% to 11.4%, 4 under 8%.

1954-55:

16 tests, November 1 to December 14, 1954, oil 7.1% to 10.2%, 6 under 8%.

* * * * *

The California oil test is of individual avocados,* selected as "the least maturing appearing avocados" (R. 639), and the statute allows no percentage of tolerance for avocados containing less than 8% oil. Thus, although a composite sample of a number of avocados may show 8% or more oil, this by no means obviates risk that a truck load of avocados of the same variety, even if picked from the same grove, will not have some avocados with less than 8% oil which may be among those selected for the oil test. (See Pl. Ex. 22, R. 445.)

To recapitulate, Dr. Harkness found no correlation between oil content of the Florida avocados and maturity or quality of the fruit. Great variation in oil content was found between avocados of the same variety picked at the same time not only from trees in different groves, but also when picked from different trees in the same grove or block, or even from the same tree. These variations in oil content, unexplained by difference in growing conditions or horticultural procedures, excludes use of oil percentage as a valid determinant of maturity or quality of the Florida fruit, even in application of such percentage to avocados of the same variety, much less in application to all avocados without regard to the inherent differences between varieties.

When the oil tests made by Dr. Harkness are considered in relation to the California requirement of 8% oil content for sale of the Florida avocados in that state, it is indicated: (1) that some commercially im-

*Fred Pigwaty, secretary of Florida Lime and Avocado Growers, Inc., testified that on shipments of Florida avocados to California in the 1954-55 season the oil tests made in California were of composite samples. (R. 321.) This testimony was unrefuted. In subsequent years, however, the oil tests were of individual avocados.

portant varieties of Florida avocados are completely barred from sale in California because they never attain 8% oil content at any time during the marketing season for these avocados (*e.g.*, Pollock, Waldin); (2) that the marketing season of the highly important Booth 8 and Booth 7 varieties, comprising over 40% of the 1959-60 crop (Deft. Ex. "E", R. 488-492), is nearly at an end before any of these avocados attain 8% oil content, then only in negligible volume; (3) that although the Lula, first in volume of production until the 1959-60 season, attains 8% oil content in greater number during the marketing season for this variety, samples of Lulas tested late in the season still showed less than 8% of oil, so that hazard of failure to pass an 8% oil test persists throughout the season; (4) that the late maturing varieties, such as the Hickson, Booth 1 and Taylor, all of relatively minor commercial importance, although inherently of higher oil content than the summer and autumn varieties, fell short of 8% oil in some of the tests made in December and January, also showed similar unforeseeable variations in oil content as the earlier maturing varieties.

Certain coincidental circumstances relevant to the marketing of Florida avocados in California greatly enhance the significance of these oil tests. The residents of California consume about as many avocados as are consumed in all the other states together.* Notwithstanding California's own large production of avocados,

*This estimate is made from records of unloads of avocados at the principal wholesale markets in California, together with records of the total production of avocados in the United States, embodied in answers to interrogatories by W. C. Jacobsen, former Director of the Department of Agriculture of the State of California. (R. 48-51, 53-59.)

the supply of home grown avocados in that state is at lowest ebb in the period when Florida avocados are most abundant. Because of this coincidence, the demand in California for Florida avocados is most insistent in September, October and November, when the California supply is dwindling, but this demand cannot be met because the Florida handlers cannot make firm commitment to deliver avocados with 8% oil content in California on a schedule to coordinate with programs of retail merchandising of the fruit. (Deposition of Harold E. Kendall, R. 265-266, 269-272, 301.)

Testimony of Dr. Paul L. Harding

Dr. Paul L. Harding, horticulturist and plant chemist, has been in the employment of the United States Department of Agriculture since 1930 and now has charge of the U. S. Horticultural Field Station at Orlando, Florida, also the Agricultural Marketing Service Station at Miami. His study of horticultural plant physiology and plant chemistry began at Brigham Young University and included post-graduate work at the University of Utah, Utah State Agricultural College and Iowa State College. At Iowa State College he received his Ph.D. degree and served on the staff in the horticultural department. In the Department of Agriculture, by a series of promotions, he became Principal Plant Physiologist in 1949, then Supervisory Plant Physiologist in 1959. (R. 558-559.)

Dr. Harding came to Florida from the Washington office of the Department of Agriculture in 1935 and has since then been continuously engaged in research projects on Florida fruits. What brought him to Florida was an appeal by members of the citrus industry

of that state to the U. S. Department of Agriculture to undertake research that might lead to the establishment of more satisfactory standards for determination of the maturity of the Florida fruits. Upon assignment to this project, Dr. Harding spent three to four years in intensive study of Florida oranges, followed by about four years of study of grapefruit, then tangerines, temple oranges, tangelos and Murcott Honey oranges. In 1949, on the basis of the data accumulated by Dr. Harding, Florida adopted a new set of standards for citrus fruits, an achievement for which he received notable merit awards. (R. 560-561.)

In 1953 another appeal for help came from Florida to the U. S. Department of Agriculture, the petition by growers and handlers of Florida avocados to the Secretary of Agriculture to enter into a marketing agreement to govern the sale of their fruit. Dr. Harding was called upon to participate in the consideration of this petition and thereupon began his study of Florida avocados.

The aim of the research conducted at the Florida stations of the Department of Agriculture under the direction of Dr. Harding was to determine what standards of maturity and quality would best assure customer acceptance of the Florida avocados, thereby to promote the successful marketing of this fruit. Such a research project could be undertaken only with approval and budgetary provision by the officers in charge of the research center in the Washington office of the Department of Agriculture. All data gathered in the research become part of the records of the Department of Agriculture; summaries of the progress of the research are included in annual reports to the Sec-

retary of Agriculture; such summaries, when approved for general publication by the officers of the department, appear also in appropriate horticultural journals.* (R. 568, 573, 583.)

In the first year of Dr. Harding's avocado research, the 1953-54 crop year, tests were made at the Orlando station of 200 lots of avocados (3110 individual avocados), representing 16 commercial varieties of the fruit, to ascertain whether maturity and palatability of the fruit could be assured by designating picking dates for each variety in correlation with attainment of specified minimum weight, as proposed by sponsors of the proposed marketing agreement. (Pl. Ex. 23, R. 446-467.) To arrive at a judgment as to the palatability of the fruit—the "flavor" or "customer acceptance,"—Dr. Harding called to his assistance a panel of qualified tasters of the fruit and directed them to record their rating of the flavor of the fruit by use of a numerical score card formulated by him.** Evaluation of the

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*The research projects are also submitted for approval to the National Citrus and Subtropical Research & Marketing Advisory Committee, composed of members from all over the United States, and reports of the progress of the research are also made to this committee, for recommendations by the committee to the Secretary of Agriculture. (R. 559.)

**Dr. Harding's score card for testing taste or flavor of avocados provides for numerical ratings in four categories:
Green: grassy bitter, unpleasant after taste, unpalatable and rubbery to soft texture; does not meet consumer acceptance; numerical rating range—50 to 59.
Unpalatable: flat, watery, slightly bitter, slightly unpleasant after taste, rubbery to soft texture: does not meet consumer acceptance; numerical rating range—60 to 69.
Palatable: smooth, mellow, watery, satisfactory flavor; firm to soft texture; meets minimum standard of consumer acceptance; numerical rating range—70-79.
Excellent: smooth, mellow, tasty, rich, nutty with quality of distinct excellence and buttery texture; numerical rating range—80-100.
(R. 565-568; Pl. Ex. 23, R. 450.)

quality of fruits and other edibles by panels of tasters is standard procedure in research on maturity and quality. (R. 566.)

The general findings derived from the 1953-54 tests showed a close relation between quality of fruit and definite picking dates and weight; that in the 1953-54 crop year, the proposed standards would have permitted the shipment of fairly satisfactory fruit; that maturity of fruit within a variety could be fairly well defined on the basis of specified picking dates in conjunction with minimum weight. (R. 452.)

Additional tests of the relation of palatability of the fruit to picking date and weight were made at the Orlando station in the 1954-55 crop year, the first year under the marketing agreement. Two hundred and nine samples of 31 different varieties of avocados, each sample consisting of 30 fruit picked at random from 16 South Florida groves, were tested. (Pl. Ex. 24, R. 468-477.) The findings were that "Palatability of fruit at any date of picking was associated with a minimum weight and a corresponding diameter." Further: "There seemed to be little connection between flavor and physical characters other than picking date, weight or diameter. . . . There appeared to be a straight-line relationship between picking date, fruit weight and fruit diameter and flavor rating from maturity to post-maturity for Lula, Booth 8, Booth 7, Hickson, Taylor and Booth 1 varieties." (R. 473, 477.)

In the 1955-56 crop year, the scope of the research was enlarged to take account of various chemical changes of the fruit during the growing season, in addition to changes in weight and diameter, in relation to ma-

turity and quality of the fruit, *viz.*, total soluble solids in the fruit, phenolic compounds, reducing sugars and oil content. Over 5,000 avocados were tested, consisting of 60-fruit samples of 14 varieties of the fruit picked each week for a period of six weeks, half of each 60-fruit sample including fruit below the minimum weight for picking prescribed under the marketing agreement and half fruit that met or exceeded the minimum weight requirement for marketing. Some of the samples were picked before the earliest permissible picking date under the marketing regulation and some after this date. Half of each sample, 15 below and 15 above minimum weight requirement, was retained at Homestead, in Dade County, where the samples of all but one of the varieties were picked, for the chemical tests to be made at the Miami Station of the U. S. Department of Agriculture; the other half was shipped to Orlando, for the palatability tests to be made after ripening of the fruit. (R. 480.)

A complete record of all these tests appears in plaintiffs' exhibit 25. (R. 478-485.) An abbreviated version of this exhibit, limited to the eight leading varieties of the fruit, and omitting the percentages of soluble solids, phenolic compounds and reducing sugars, is here presented:

Tests of Florida avocados made in 1955-56 season at Miami and Orlando Stations of U. S. Department of Agriculture, Marketing Service, Quality Maintenance and Improvement Section

Variety	Date picked[1]	Hard fruit (Homestead)				Soft fruit (Orlando)			
		average weight		oil content		average weight		flavor[2]	
		below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.
POLLOCK	1955	ounces		percent		ounces		numerical rating	
4.55% of 1955-56 crop.	June 27	13.6	16.7	2.4	1.8	12.7	17.5	65	69
Earliest regulated picking date in season, July 4, 1955, at minimum of 16 ounces.	July 5	12.0	17.6	1.9	3.1	13.7	20.1	73	75
	" 11	11.8	22.4	2.5	2.6	13.7	21.6	75	77
	" 18	11.6	22.7	3.1	3.1	13.6	17.8	80	85
WALDIN									
9.73% of 1955-56 crop.	August 1	14.2	16.4	4.9	5.3	14.6	17.3	65	73
	" 8	14.2	17.1	4.9	4.6	13.4	17.4	70	78
Earliest regulated picking date in season, August 1, 1955, at minimum of 16 ounces.	" 15	13.4	17.1	3.3	3.6	13.8	18.0	75	85
	" 22	13.6	16.8	3.3	3.3	14.2	17.4	70	72
	" 29	14.3	17.3	4.2	4.2	13.9	18.7	78	85
	September 6	13.0	17.9	3.9	3.9	13.8	18.4	81	86

[1]Each date: sample of 60 fruit picked in vicinity of Homestead, 30 *below* and 30 *above* minimum weight requirements for marketing under 1955-56 regulations; half of each sample retained at Homestead for chemical tests, half shipped to Orlando for flavor tests.

[2]Flavor rating in accordance with Dr. Harding's score card: under 70, unpalatable; 70-79, palatable; 80-100, excellent. Tests made after softening in storage chamber at 80°F.

Tests of Florida avocados in 1955-56 season—page 2

Variety	Date picked[1]	Hard fruit (Homestead) average weight below min. wt.	Hard fruit (Homestead) average weight above min. wt.	Hard fruit (Homestead) oil content below min. wt.	Hard fruit (Homestead) oil content above min. wt.	Soft fruit (Orlando) average weight below min. wt.	Soft fruit (Orlando) average weight above min. wt.	Soft fruit (Orlando) flavor[2] below min. wt.	Soft fruit (Orlando) flavor[2] above min. wt.
	1955	ounces		percent		ounces		numerical rating	
BOOTH 8									
16.56% of 1955-56 crop.	August 29	11.6	14.5	4.2	4.2	11.7	15.6	60	68
	September 6	11.2	16.7	5.4	5.4	11.3	16.4	71	78
Earliest regulated picking	" 12	11.1	15.4	4.6	4.6	10.8	16.7	74	79
date in season, September	" 19	10.3	16.9	4.9	4.9	10.9	15.8	76	80
19, 1955, at minimum of	" 26	11.7	15.2	4.7	5.3	10.9	15.5	75	76
14 ounces.	October 3	10.3	16.1	5.2	5.2	11.3	15.9	78	77
BOOTH 7									
13.29% of 1955-56 crop.	September 19	11.0	17.7	3.5	4.2	13.0	19.3	77	76
	" 26	12.9	16.8	3.8	4.6	11.9	17.7	78	79
Earliest regulated picking	October 3	13.0	17.3	5.2	4.0	11.6	19.0	76	79
date in season, October 10,	" 10	11.6	16.9	4.4	4.6	12.1	19.7	78	79
1955, at minimum of 16	" 17	13.3	17.8	4.2	4.7	13.4	18.7	81	84
ounces.	" 24	13.6	17.9	5.2	6.9	12.0	18.8	77	81
LULA									
24.07% of 1955-56 crop.	September 26	14.3	16.4	4.3	5.3	14.3	17.3	76	74
	October 3	14.0	16.8	5.7	6.9	12.6	17.8	73	75
Earliest regulated picking	" 10	14.2	16.6	6.5	5.1	12.5	17.7	75	77
date in season, October 17,	" 17	13.2	18.0	4.8	5.6	11.9	17.8	72	75
1955, at minimum of 16	" 24	14.1	17.2	5.1	6.0	13.4	17.4	76	76
ounces.*	" 31	12.7	17.9	5.2	6.4	13.8	17.3	74	76

*Picking date of October 3, 1955, at minimum of 18 ounces, disregarded in this study.

Footnotes (1) and (2) at p. 25, *supra*.

Tests of Florida avocados in 1955-56 season—page 3

Variety	Date picked[1]	Hard fruit (Homestead)				Soft fruit (Orlando)			
		average weight		oil content		average weight		flavor[2]	
		below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.	below min. wt.	above min. wt.
	1955	ounces		percent		ounces		numerical rating	
HICKSON									
3.57% of 1955-56 crop.	September 26	11.3	16.1	5.8	5.3	12.1	18.2	75	77
	October 3	10.7	16.9	6.2	6.6	10.7	16.1	71	72
Earliest regulated picking	" 10	10.5	14.5	7.2	5.6	9.7	16.1	72	73
date in season, October 17,	" 17	8.6	15.5	5.4	6.1	9.9	17.6	72	75
1955, at minimum of 14	" 24	11.2	17.5	6.0	6.1	10.5	16.8	68	69
ounces.	" 31	11.9	15.3	7.4	7.4	11.5	16.5	69	69
BOOTH 1									
5.60% of 1955-56 crop.	October 31	12.3	—	—	—	12.9	—	64	—
	November 7	11.7	17.9	6.0	9.2	12.6	19.3	72	74
Earliest regulated picking	" 14	13.1	17.4	6.6	8.2	12.7	20.0	72	72
date in season, November	" 21	12.1	17.4	6.7	7.1	11.9	21.9	76	82
21, 1955, at minimum of	" 29	11.7	19.4	6.9	10.0	13.3	20.6	75	80
16 ounces.	December 6	12.3	18.6	9.2	10.3	12.5	19.9	72	74
TAYLOR									
2.97% of 1955-56 crop.	November 1	10.0	11.8	6.0	6.0	10.7	12.6	69	71
	" 8	10.4	12.1	5.4	5.4	10.7	13.0	78	79
Earliest regulated picking	" 15	9.8	12.1	6.0	6.2	10.8	13.0	76	76
date in season, November	" 22	10.2	12.4	6.4	7.3	10.8	13.3	81	84
21, 1955, at minimum of	" 28	9.9	12.2	7.4	7.8	9.5	13.4	82	86
12 ounces.	December 5	9.7	12.1	7.5	7.6	11.1	13.0	81	82

Footnotes (1) and (2) at p. 25, *supra*.

The analyses of these avocados for percentage of soluble solids, phenolic compounds, reducing sugars and oil content, each week for six weeks before and after the earliest picking date for each variety under the maturity regulations, showed no appreciable change in the percentage of any of these components of the fruit during the six weeks. In the palatability tests, after softening of the fruit to the proper stage of ripeness, no statistical correlation was found between flavor of the fruit and percentage of soluble solids, phenolic compounds, reducing sugars, or oil content. The ultimate conclusion, accordingly, was that the maturity regulations under the marketing agreement, based on correlation of weight of the fruit and picking dates, remained the most satisfactory determinant of maturity of the Florida avocados. (R. 482.)

Continued studies of maturity and quality of the Florida avocados made by Dr. Harding and his staff in subsequent crop seasons confirmed the findings made in the 1955-56 and prior seasons. (Pl. Ex. 26, R. 486-487.)*

The 1955-56 oil tests directed by Dr. Harding, like the oil tests made in previous years by Dr. Harkness

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*From plaintiffs' exhibit 26, R. 486: "During 1958-59, 1959-60 and 1960-61 approximately 3,500 individual avocados were analyzed for oil content and measured for weight and diameter. These studies included 37 different varieties. . . . In general, over the three-year period, the initial release dates and the date at which the fruit was at minimum consumer acceptability or above were in agreement. Extreme conditions, such as the freeze which occurred in the 1958-59 season, delayed the maturity of the fruit. . . . Present methods of establishing maturity standards on the basis of weights or diameters at specified picking dates are reasonably satisfactory. Standards based on oil content are not practical for Florida avocados because of the high degree of variation between varieties, among individual fruits of a variety, and the year-to-year variation."

and his assistants, reveal graphically the handicap of attempting to market Florida avocados in California in face of the 8% oil requirement. At no time in the series of tests, particularly those made on or after the initial picking date for each variety, did any sample of the Pollock, Waldin, Booth 8, Booth 7, Lula, Hickson and Taylor varieties contain 8% of oil, although half of these samples were of avocados weighing more than the required weight for immediate marketing. As to the Booth 1, which has a relatively short marketing season, the above-weight sample tested for oil content on November 21, 1955, when it became eligible for marketing, also contained less than 8%.

Dr. Harding testified that in his opinion, based on his training and experience as plant physiologist and chemist, and his eight years of special research work on the avocados grown in Florida, percentage of oil content is not a scientifically valid determinant of maturity and quality of the Florida avocados; that the oil tests of Florida avocados made by him and his assistants showed that there is considerable variation in oil content among any given lot of these avocados picked at one time; that his panel of tasters could not differentiate between the avocados of higher or lower oil content, or give preference to either; that a specified percentage of oil content, such as 8%, applied to avocados generally, disregards the fact that some Florida varieties of the fruit are acceptable and palatable at 2% or 3% of oil, nevertheless these varieties are condemned entirely by an 8% oil requirement; that other Florida varieties, West Indian-Guatemalan hybrids, might attain 8% oil content at some time if left on the tree long enough, possibly the last 20%, but some

of these would drop to the ground and others would become overripe and would not have the requisite carrying qualities for shipment. (R. 584-585, 616-620.)

Appellants' interest

Appellants are leading handlers of Florida avocados registered and authorized to operate as such handlers under the marketing order of June 11, 1954. (Pl. Ex. 1 and 2, R. 353, 354.) Appellant Florida Lime and Avocado Growers, Inc., is a corporation for profit that succeeded to the business of a cooperative organized in 1939. Appellant South Florida Growers Association, Inc., is successor to the business operated individually by Harold E. Kendall commencing in 1939. Each of the appellants has a packing house in Dade County, Florida, where avocados are graded, packed, refrigerated and shipped for sale. Appellants also have avocado groves of their own and operate other groves as lessees or managers.

Sales of avocados by Florida Lime and Avocado Growers, Inc., in the six seasons from 1954-55 through 1959-60, aggregated $1,299,920; sales of South Florida Growers Association, Inc., in these six seasons, $4,899,722. (R. 120-125, 549-552.) Approximately 98% of these sales were made outside the state of Florida. (R. 441-442.)

Both appellants, prior to the institution of this suit, made assiduous efforts to avail themselves of the California market for Florida avocados, notwithstanding the California requirement of 8% oil content for sale of the fruit in that state, as appears from their exhibits 19 and 20, also defendants' exhibits P, Q, R and S. (R. 440, 441, 499-504.) As a precaution

to minimize risk of rejection of the avocados to be shipped to California, appellants procured oil tests of many samples of the fruit at the Homestead Subtropical Experiment Station of the University of Florida before attempting such shipments. (Pl. Ex. 12 and 13, R. 257-262, 317-318, 371, 375.) These oil tests were principally of Lula samples, a few of the several Booth varieties and of Hickson and Taylor. The materiality of these oil tests is twofold: first, as evidence of appellants' efforts to meet demand for their fruit in California, and second, as evidence of inability to meet this demand because of unavailability of Florida avocados with 8% oil content in sufficient volume to make shipments to California during the first several weeks of the marketing season for the principal varieties, nor even thereafter with the consistency needed for more than sporadic sales.

Of the many samples of Lulas tested, only a negligible number showed 8% oil content during the first month or more of the marketing season for this variety, which begins normally during the first week of October. From mid-November onward, more of the Lulas showed 8% of oil, yet even in late November and December many of the samples ran under 8%, some even under 7%. (R. 371-378.)

Not only has the 8% oil barrier greatly restricted appellants' access to the California market for their avocados, their efforts to make sales of the fruit in California in face of the 8% oil requirement have resulted in cash losses, as set forth in their exhibits 17 and 21. (R. 438, 443.) Of special significance is the late time in the marketing season when appellants' attempted sales in California were thwarted by the 8% oil test, *viz.:*

Shipments of avocados to California by appellants barred from sale upon oil test

Florida Lime and Avocado Growers, Inc.:

November 10, 1955: 1129 lugs (@ 13½ to 15 lbs.) of Lula avocados shipped to Safeway Stores at Oakland, entire load rejected and reshipped to Salt Lake City.

November 12, 1955: 2083 lugs of Lula avocados shipped to Safeway Stores at Sacramento and Oakland, entire load rejected and reshipped to Portland.

November 14, 1955: 2208 lugs of Lula avocados shipped to Safeway Stores at Oakland, entire load rejected and reshipped to Medford, Oregon, and Seattle.

December 8, 1955: 700 lugs and 200 spruce boxes (@ 40 lbs.) of Lula avocados shipped to Mendelson-Zeller Company, Los Angeles, entire load rejected and reshipped to El Paso, Texas.

November 15, 1957: 1874 lugs of Lula avocados shipped to California; 900 to Williams and Son Produce Company, Los Angeles, and 974 to Felix Cohen & Son, Oakland; 361 lugs out of the 900 unloaded at Los Angeles rejected and reshipped to Phoenix.*

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*Fred Piowaty, Secretary of Florida Lime and Avocado Growers, Inc., produced the records of these transactions showing net loss of $7,496. (R. 318-319.) He testified that these were not all of the California shipments by his company that were rejected upon arrival for failure to pass the 8% oil test, but only those accurately identifiable. (R. 330, 331.) Also, in explanation of the shipments made in the 1954-55 season—some in the latter part of October and forepart of November in 1954 (R. 502)—apparently without rejections, he testified that it was his understanding that the oil tests of these shipments were of composite samples, not of individual samples as in subsequent seasons. (R. 321.) However, appellants do not gainsay the propriety of testing individual samples under Sec. 792 of the Agricultural Code of California, which provides that "all avocados" shall contain not less than 8% of oil.

South Florida Growers Association, Inc.:

November 10, 11, 12 and 18, 1954: Four shipments made to Calavo Growers of California, or on order of Calavo; rejected at Los Angeles, 118 boxes (@ 40 lbs.) Lula avocados, 539 boxes Booth 7 avocados, 97 boxes Lula avocados, 72 boxes Lula avocados, respectively; all reshipped to Phoenix and there sold by Calavo.

November 16, 1955: 282 boxes (@ 40 lbs.) out of shipment of Lula avocados to Lucky Stores at San Leandro, on order of Calavo, rejected and reshipped to Portland.

November 26, 1956: 721 flats (@ 15 lbs.) out of shipment of Lula avocados to Calavo, at Los Angeles, rejected and reshipped to Phoenix.

November 14, 1957: 492 flats out of shipment of Lula avocados to Lucky Stores, Leandro, on order of Calavo, rejected and reshipped to Salt Lake City.

Reshipment of the rejected avocados entailed added transportation and handling charges and, in some instances resale at much lower prices to avoid overripening of the fruit. Aside from the direct cash loss, forced sale of the fruit in other markets had an unsettling effect upon the shipments that were being made to these markets directly from Florida. (R. 267-268.) Above all else, the difficulty experienced by appellants has been inability to set up a schedule of assured deliveries to California of avocados with not less than 8% oil content, to synchronize with a sustained program of retail promotion and advertising of the fruit, thus limiting the marketing of their avocados in California to sporadic sales. (R. 265-266.)

It is of interest to note incidentally that the Calavo organization, serving as selling agents for appellant South Florida Growers Association, Inc., considered the rejected Florida avocados with less than 8% oil content suitable for sale through its offices in Phoenix, Portland and Salt Lake City. (R. 438-439.)

Appellees' evidence

No evidence was introduced by appellees in refutation of the testimony of appellants' witnesses, nor was there impeachment of this testimony in any particular.

In the amended answer to the complaint, a "fifth defense" was interposed to the effect that the maturity and quality standards promulgated under the Florida avocado marketing order, and the methods of administration thereof, are unreasonable, arbitrary and invalid in that they fail to comply with the requirements of the Marketing Agreement Act of 1937. (R. 119, 787.) During the trial of the case, however, this defense was withdrawn. (R. 571.)

The principal witness for appellees, Dr. David Appleman, Professor of Plant Nutrition at the University of California in Los Angeles, testified that he has been using avocados as subject material in some of his research work; that oil is one of the substances that develops and changes during the process of development of the avocado, and that as such he has studied it. (R. 648.) With this statement and nothing more, Dr. Appelman was asked, "In your opinion is oil content a reliable index of avocado maturity?" and he answered, "In my opinion it is as good an index as we can have at present." (R. 648.)

The further examination of Dr. Appelman elicited the following: that his work has had nothing to do with maturity or edibility of the fruit; that it deals with some enzymitic changes in the fruit and has relationship to some cancer studies; that all of his work has been done with only two varieties of California avocados, the Fuerte and the Hass, both of oil content as high as 24% to 26%; that "I don't know anything about Florida avocados." (R. 654-655, 658.)

Appellees' witness H. W. Poulsen, Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture, was permitted to answer whether in his opinion the 8% oil standard has been effective in keeping immature avocados off the market, without particularization of any kind, and of course answered in the affirmative. (R. 631.) He could name no variety of California avocados that has had difficulty in meeting the 8% oil test. (R. 631-632.) On cross-examination he stated that in large part the Fuertes sold in California have more than 8% oil content; that a Fuerte avocado is better if it has more than the required 8% oil content. (R. 634-635.)

Other witnesses for appellees were Presley Wiggs, Assistant General Manager of Calavo Growers of California, a cooperative, and Albert C. Jones, a former employee of Calavo, now sales manager for Western Fruit Growers Sales Company of California. Calavo has a somewhat anomalous relation to this case. For many years prior to this lawsuit, Calavo served as selling agent for Harold E. Kendall and then for appellant South Florida Growers Association, Inc. when it succeeded to Kendall's individual business and, as

such agent, Calavo sold Florida avocados in substantial volume through its many sales offices in all parts of the United States. (R. 667-669, 674-675.) In this litigation, however, Calavo has leagued itself actively with appellees at all stages of the case.* The chameleon-like role of Calavo is exemplified by the testimony of the witnesses Presley Wiggs and Albert C. Jones.

Both of these witnesses testified that they had experience in the marketing of Florida avocados, as employees of Calavo, in the southwestern part of the United States, particularly sale of some of the West Indian varieties of low oil content grown in Florida, such as the Fuchs, Pollock, Trapp and Waldin varieties. (R. 669, 675.) Both stated that in their opinion the marketing of these West Indian varieties in California would not be commercially expedient or profitable because the ripening period of these avocados is shorter than that of the hybrids, such as the Lula, Hickson and the several Booth varieties. (R. 667, 670.)

Mr. Wiggs, in his statement regarding the potential profitability of marketing the West Indian avocados in California, first estimated the transit time from Florida to California by refrigerated truck at five days, but later modified this estimate to four and a half days; that if the fruit on that truck were pre-sold, it would probably take another two to three days to dispose of it, or five or more days if not pre-sold, and that this would not leave adequate time for the retailer to turn the merchandise at a profit. (R. 667.) On cross-examination, however, the witness testified

*Calavo's attorney, William A. Norris, participated in the taking of the depositions, also as co-counsel for the defendants upon the trial of the case in the district court. (R. 145, 557.)

that Calavo has handled sales of the West Indian avocados, as well as other varieties grown in Florida, throughout the United States, excepting only California, and has made substantial sales of these avocados in Washington, D. C., New York, Boston, Cleveland, Chicago, Kansas City, Atlanta, New Orleans, Houston, San Antonio, Dallas Denver, Salt Lake City, Phoenix, El Paso, Seattle and Portland (R. 669); that the transit time from Florida by refrigerated truck to Denver, Phoenix or El Paso is as much as three and a half days (R. 670); that under refrigeration the ripening process is slowed down to a negligible point (R. 670), which applies also to the time of continued refrigeration upon arrival at wholesale produce markets, or in the refrigerated storage rooms of chain store retailers.

While it is undisputed that, in general, the ripening period of West Indian avocados is somewhat shorter than that of the hybrids, the difference is exaggerated by appellees' witnesses. Particularly as to the Waldin, by far the volume leader of the West Indian avocados produced in Florida.* In the tabulation of palatability tests of 14 varieties of Florida avocados made at the U. S. D. A. Orlando Station in the 1955-56 season, over a period of six weeks, there is shown the ripening time for each sample under identical conditions of transit and storage (two to three days transit by rail from Homestead to Orlando, followed by storage in the Or-

*Volume of Waldin shipments (Defts. Ex. "E," R. 488-492):

1955-56	50,259 bu.	9.73% of crop
1956-57	38,148 "	8.68% "
1957-58	60,261 "	10.25% "
1958-59	12,808 "	7.46% "
1959-60	30,980 "	9.15% "

lando laboratory at 80° F.). Duration of storage time for the six samples of Waldins was 5, 6, 6, 7, 6 and 5 days respectively, as compared with 7 to 8 days for the Booth 8, or 6, 7 to 8 days for the Booth 7, or 6 to 8 days for the Lula, or 6 to 7 days for the Hickson. (Pl. Ex. 25, R. 483-484.) Thus, even without refrigeration, the difference in ripening time between the Waldin and the hybrid varieties lends slight support for the opinions of appellees' witnesses as to the marketability in California of this important West Indian variety.

In another aspect, the testimony of appellees' witnesses exposes the competitive urge of the local growers and handlers of California avocados to keep the Waldin and other Florida avocados out of the state. As appears from the testimony of Presley Wiggs, the peak of the California avocado season is in February and March; the low point in production and sales is during September, October and November, and this is when the prices are highest; the prices begin to recede when the Fuertes begin to come into the market about the middle of November. (R. 665-666.) September, as it happens, is the month of heaviest shipment of the Waldin avocados; some in the last part of August, some also in the first part of October. (Pl. Ex. 4 and 7, R. 356, 361.) When it is added that the Booth 8 and Lula become abundant in October and the Booth 7 in November, the three leaders in volume, and that this is the most favorable time for the marketing of this fruit in California, it is apparent why retention of the 8% oil embargo against the Florida avocados is prized for the artificial competitive advantage it gives to the California avocado industry.

SUMMARY OF THE ARGUMENT.

Congress, in recognition of the vital importance of agriculture as a mainstay of the national economy, has instituted vast national regulatory programs to promote efficient and profitable operation of this industry. Among these programs is regulation of the interstate commerce in agricultural commodities, in the manner provided by the Agricultural Marketing Agreement Act of 1937. Interstate commerce in the avocados grown in Florida is governed by a marketing agreement and order made by the Secretary of Agriculture of the United States pursuant to the authority vested in him by said Act of Congress. The salient feature of this marketing order is to establish and enforce standards of quality to be met by these avocados as a condition precedent to marketing, thereby to promote consumer acceptance of the fruit by keeping off the market avocados that are immature or otherwise of inferior quality.

Notwithstanding such federal regulation, whereby interstate shipment of the Florida avocados is barred unless accompanied by a certificate of compliance with the federal standards of maturity and quality, sale of the Florida avocados in California, a prime market for the fruit, is restricted to avocados containing not less than 8% of oil, the standard of maturity and quality under Section 792 of the Agricultural Code of California. The evidence in this case establishes, without contradiction, that oil content is not a valid determinant of the maturity or quality of the avocados grown in Florida; that some of the varieties of the fruit grown in Florida are of extremely low oil content, but are none the less mature and of good quality; that other varieties, although they

ultimately attain somewhat higher oil content, do so inconsistently and only long after they have reached maturity and maximal quality and are ready for marketing; that, consequently, oil content has not been adopted under the federal regulations as an indicant of maturity or quality of the Florida avocados; instead, for each of the varieties of avocados grown commercially in Florida, in each crop season, permissible picking dates are assigned in correlation with attainment by avocados of the particular variety of specified minimum weight or diameter.

By enforcement of Section 792 of the Agricultural Code of California to bar sale in that state of Florida avocados with less than 8% oil content, in disregard of the certification of such avocados under federal law and regulations as mature and of requisite quality for interstate marketing, the major part of the Florida crop is excluded entirely from the California market and sale of the Florida fruit in that state is limited to sporadic shipments late in the marketing season, even then at risk of condemnation and substantial loss. The Supremacy Clause of the United States Constitution forbids such flagrant disregard of federal law and regulations.

Further, application of California's 8% oil content requirement to the Florida avocados offered for sale in that state is an impermissible interference with the freedom of commerce among the several states, in violation of the Commerce Clause of the Constitution, also a

denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. No valid local police purpose is served by barring from sale avocados that of their innate nature and conditions of growth happen to have less than 8% oil content, but cannot for that reason be legitimately branded as immature or of inferior quality, yet lack of 8% oil content is the only basis upon which appellees and their subordinates have barred Florida avocados from sale in California. The only purpose thus served is to give competitive advantage to the growers and handlers of the avocados grown in California, the preponderant varieties of which happen to have oil content far in excess of 8%, but are not for that reason more healthful or of quality superior to that of the varieties which come to maturity with less than 8% oil content. The result is invidious discrimination against the producers and handlers of the Florida fruit, as well as restriction of interstate commerce, unjustifiable as a purported exercise of the police power of the state to protect its inhabitants from consumption of unhealthful food, or from fraudulent imposition.

ARGUMENT.

I.

Application of Sec. 792 of the Agricultural Code of California to avocados grown in Florida and shipped for sale in California, to bar sale in that state of Florida avocados with less than 8% oil content, after certification under valid federal law and regulations that such avocados are of requisite quality and maturity for marketing in interstate commerce, is precluded by the Supremacy Clause of the United States Constitution.

As heretofore stated, since June 11, 1954 all shipments of Florida avocados in interstate commerce have been governed by the Federal Agricultural Marketing Agreement Act of 1937 and the marketing order made thereunder, with respect to these avocados, by the Secretary of Agriculture of the United States. (Florida Avocado Order No. 969, referred to as No. 69, R. 15-33.) The Florida avocado marketing agreement is of quite limited scope. Of the various procedures designed by the Marketing Agreement Act to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce," the Florida avocado agreement originally included only one, *viz.*: "To establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this Title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodites as will be in the public interest." (Sec. 602(3), *infra*, p. 89.)

Subsequently, pursuant to authorization by amendment of the Act adopted August 28, 1954, the Florida avocado agreement was amended to bring within its scope regulation of the containers to be used in the packaging of the fruit.* also provision for establishment of marketing research and development projects designed to improve or promote the distribution and consumption of the fruit, the expense of such projects to be paid from the funds collected pursuant to the marketing order. (20 F. R. 2587, 3259, 4177.)

That the Agricultural Marketing Agreement Act is a valid exercise of the power of Congress to regulate commerce among the several states is not disputed in this case. (See: *United States v. Rock Royal Co-Op, Inc.*, 307 U. S. 533, 59 S. Ct. 993; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523.) Also, notwithstanding the earlier pleading of a defense to the contrary, it is now undisputed in this case that the maturity and quality standards promulgated by the Secretary of Agriculture under the Florida avocado marketing order, and the methods and procedures used in the administration thereof, are in compliance with

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*As to the containers in which the Florida avocados enter the California market, regulation under federal law is accepted as conclusive, *viz.*:

Agricultural Code of California, Sec. 788:

"Nothing in this chapter shall be construed to (a) conflict with any California or federal laws or regulations regarding net weight or other markings on containers or subcontainers, or (b) prohibit the shipment, transportation, delivery for sale or sale of fruits, nuts or vegetables, imported into this State in containers established as standards by the applicable laws or regulations of the United States." (Deering's California Codes, Agriculture, 1962 edition; clause (b) added by Stats. 1949, ch. 415, §1, p. 762.)

the requirements of the Marketing Agreement Act. (*Supra*, p. 34.)

Every load of avocados grown in Florida, when it leaves that state and enters into the stream of interstate commerce, is accompanied by a certificate of inspection issued by the joint Federal-State Inspection Service of the U. S. Department of Agriculture and the Florida Department of Agriculture attesting that the avocados meet the requirements for interstate marketing of the fruit under the orders of the Secretary of Agriculture of the United States. (*Supra*, p. 8.) Thus, the question to be adjudicated is whether in face of such certification of the Florida avocados as of requisite maturity and quality for sale in interstate commerce, such avocados may be barred from sale in California if of less than 8% oil content, a requirement entirely foreign to determination of maturity and quality of the fruit under federal regulation.

The opinion of the District Court, it is submitted, misconceives the nature of the Agricultural Marketing Agreement Act and the action taken thereunder with respect to the Florida avocados. The argument is that the federal law does not cover the whole field of interstate shipment of avocados; that Florida Avocado Order No. 69 does not govern interstate shipment of the avocados grown in California, or that might be grown in Texas or Louisiana; that for all the federal law declares, avocados grown in any state but Florida may be sold in California without any standards to insure maturity; that since Congress has not established a complete regulatory scheme which covers "the whole problem," it has left a wide field for the protection of

consumers by the states in the appropriate exercise of state police power. (Opinion of District Court, at R. 767.)

By this logic, the Marketing Agreement Act is rendered meaningless and the national policy served by the Act is nullified. A marketing order under the federal statute governs the interstate marketing of a specified agricultural commodity coming from a specified regional area, the smallest regional production or marketing area which the Secretary finds practicable, consistently with carrying out the declared policy of the Act. Further, the Act provides that orders issued thereunder which are applicable to the same commodity shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity in such areas. (Sec. 608c (11), *infra*, p. 94.)

While these provisions limit the application of a particular marketing order to a specified commodity coming from a specified region, the matter regulated by the order is the marketing of such commodity throughout the United States. As to such commodity, entering the stream of interstate commerce from the designated region, the federal regulatory scheme is complete of itself, necessarily exclusive and not ancillary to regulation of such commerce under the laws of any state.

The conclusion of the District Court that there is no conflict between application to the Florida avocados of California's 8% oil content requirement, as a condition

precedent to sale of the fruit in that state, and any federal law or regulation, is contrary to all the evidence in the case. Not by inadvertence, evasion or scientific error, but as the result of horticultural study and experience, oil content has been rejected as a valid determinant of maturity or quality of the varieties of avocados grown in Florida. In the administration of Florida Avocado Order No. 69, accordingly, a basically different method of determining maturity and quality of the avocados governed by said order has been adopted and compliance with the standards thus imposed under federal law qualifies the fruit for marketing in interstate commerce, regardless of oil content. But not in California, say the appellees, because the Agricultural Code of that state forbids sale of avocados with not less than 8% oil content, regardless of place of growth, innate differences in varieties, or certification of the fruit as mature and of requisite grade under valid federal law and regulation.

In this, declares the District Court, there is no conflict, citing *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440, 80 S. Ct. 813. That this case does not support appellees' contention, adopted by the District Court, is readily apparent. The alleged conflict, in the case cited, was between federal regulation of the operation of vessels engaged in interstate commerce, including inspection of their equipment, and enforcement against the owner of two federally licensed vessels of certain provisions of the Smoke Abatement Code of Detroit by criminal proceedings on a charge of causing excessive emissions of smoke from the boilers of the vessels while docked at the Port of Detroit. This court declared that the problem of air pollution is pe-

culiarly a matter of local concern, not within the scope of federal regulation; that the aim of federal regulation was to protect the crews and passengers of the inspected vessels from the perils of maritime navigation by seeing to it that the equipment could be safely employed in the proposed service, while the aim of the anti-smoke ordinance was to protect health and the cleanliness of the local community, and that there was no overlap between the scope of the federal inspection laws and the city ordinance. In the present case, by contrast, the aim of the federal regulation is to establish and maintain orderly marketing of the Florida avocados in interstate commerce, in protection of the national economy, a matter within the plenary and supreme power of the federal government, and the challenged state action directly impinges upon a substantial segment of this commerce.

Quite astonishing is the statement of the District Court that "Both the state and the federal requirements may be, and are being enforced without any clash between the two authorities." The court apparently failed to note the evidence that substantial shipments of Florida avocados to California by appellants were barred from sale in that state by application of the 8% oil test (Plaintiffs' exhibits 17 and 21, R. 438, 443; also *supra*, pp. 32-33), also the evidence that urgent demand for other shipments to California could not be met by appellants because oil tests procured at the University of Florida Subtropical Experiment Station at Homestead, Florida, indicated that the avocados available for such shipments would be rejected for sale in California, although eligible for interstate marketing under federal law and regulations. (Plaintiffs' exhibits 12 and 13, R. 371, 375; also R. 257-262.)

Abundant decisions of this court, going back to the historic case of *Gibbons v. Ogden,* 9 Wheat. 1, 6 L. Ed. 23 (1824), support appellants' contention. In the exercise of its plenary power to regulate commerce among the states, Congress has seen fit to enact legislation pursuant to which the marketing of all the avocados produced in South Florida, wherever these avocados may be offered for sale, has come under the aegis of the national government. Recognition of the paramount authority of this exercise of power by Congress is the most basic principle of our federal government. As tersely expressed by Mr. Chief Justice Hughes: "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." (*Simpson v. Shepard,* 230 U. S. 352, 33 S. Ct. 729, at p. 739.)

Reference is made to some of the decisions of this court deemed to be controlling precedents in the present case, as follows:

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, and *Campbell v. Hussey,* 82 S. Ct. 327:—In the earlier case, the constitutionality of the Tobacco Inspection Act of August 23, 1935, providing for inspection and grading of the tobacco to be auctioned at the various markets in the tobacco-growing states, was sustained. It was held, first, that the purchases and sales of tobacco at the auction markets were transactions in interstate commerce, subject to congressional regulation; that inspection and establishment of standards for commodities has long been regarded as appropriate to the regulation of trade, both by the state governments and the

federal government, but that the inspection laws of a state relating to commodities involved in interstate transactions are subject to the paramount regulatory power of Congress.

The Tobacco Inspection Act again came to the attention of this court in *Campbell v. Hussey*, an action by owners and operators of tobacco warehouses in Georgia to enjoin officials of that state from enforcing certain provisions of the Georgia Tobacco Identification Act. Under the federal regulations, a certain type of flue-cured tobacco was designated as type 14. Although it was stated in the definition of type 14 that the tobacco was produced principally in the southern section of Georgia and to some extent in Florida and Alabama, the designation "type 14" was made applicable to all tobacco of the kind described regardless of geographical origin. The challenged Georgia enactment defined type 14 tobacco as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the States of Georgia, Florida and Alabama," and provided that such tobacco received in a warehouse for sale shall be marked with a white sheet ticket, in lieu of the blue ticket called for by the federal regulations. Such legislation by the state, even if regarded as merely supplementary to the federal regulation, was held to be precluded by congressional pre-emption of the field of regulation; that the "official standards" established by the Secretary of Agriculture pursuant to the federal statute were intended to be uniform, in order effectively to accomplish their purpose, and that such purpose would be thwarted by sanctioning amendment or modification under state law.

In the present case, there is both pre-emption and conflict. Establishment of standards of quality and maturity to qualify the avocados grown in the designated Florida area for sale throughout the United States could, of course, be undertaken only by the federal government. Such standards, emanating from a single authority, subject the fruit to the one set of tests of quality and maturity imposed by said authority. To permit subjection of the fruit to other tests of quality and maturity, under state law, would give to each state a right of total or partial veto of the federal regulation. It need hardly be added that there is substantial conflict when the state-imposed test of quality and maturity entirely ignores the federally-imposed test and substitutes a fundamentally different criterion of its own.

McDermott v. Wisconsin, 228 U. S. 115, 133, 33 S. Ct. 431, 435:—Wisconsin law regulating the labeling of glucose mixtures offered for sale at retail held to be unenforceable against sale of the product labeled in compliance with the requirement of the federal Pure Food and Drug Act.

Franklin National Bank of Franklin Square v. People of State of New York, 347 U. S. 373, 375-379, 74 S. Ct. 550, 552-554:—New York Banking Law, prohibiting the use of the word "savings" in the name of any bank other than its own chartered savings banks or savings and loan associations, held to be in conflict with the Federal Reserve Act and the National Bank Act, therefore inapplicable to a national bank using the word "savings" in its signs and advertising. This court said: "There appears to be a clear con-

flict between the law of New York and the law of the federal government. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the federal government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy."

Hines v. Davidowitz, 312 U. S. 52, 61 S. Ct. 399:— Pennsylvania adopted an Alien Registration Act in 1939, followed by enactment of a federal Alien Registration Act in 1940, and it was held by this court that the action of Congress foreclosed further enforcement of the Pennsylvania law. The opinion of the court stresses the national concern with the problem of alien registration because of treaties with other nations dealing with rights of aliens, also the need to harmonize alien registration with the national policies reflected in the immigration and naturalization laws, and concludes that from the nature of the problem and the legislative history of the federal Act it was apparent that the purpose of Congress was to provide for alien registration in a single and all-embracing national system.

In the present case, more obviously and flagrantly, the vital national interest served by the Marketing Agreement Act would be frustrated if the regulations issued thereunder to govern interstate commerce in agricultural commodities were permitted to be flouted by enforcement of state laws affecting the same commerce, claimed to constitute valid exercise of the state police power.

Wissner v. Wissner, 338 U. S. 655, 70 S. Ct. 398, and *Free v. Bland,* 82 S. Ct. 1089:—In the *Wissner* case, the widow of a veteran claimed that under the community property laws of California she was entitled to a one-half interest in the proceeds of a National Service Life Insurance policy in effect at the time of her husband's death, in which his mother was named as beneficiary. The National Service Life Insurance Act gave the insured the right to name a beneficiary within a designated class which included his mother, and it was held that disposition of the proceeds of the policy was governed solely by the provisions of the federal Act, without regard to the state community property laws.

The more recent *Free* case, which arose in Texas, related to United States savings bonds issued to "Mr. *or* Mrs." Free. Under the applicable Treasury Regulations, upon the death of Mrs. Free, her husband became entitled to exclusive ownership of the bonds as surviving co-owner, but the son as principal beneficiary under the mother's will asserted an interest in the bonds by virtue of the community property laws of Texas. The trial court awarded full title to the bonds to the husband, by virtue of the federal regulations, but awarded reimbursement to the son for loss of his mother's community half interest in the bonds, under the community property laws of Texas, and made the bonds security for the payment. Again this court held that the federal regulations were controlling and the state community property laws inapplicable. To quote from the opinion:

"The relative importance to the state of its own law is not material when there is a conflict with a valid

federal law, for the framers of our Constitution provided that the federal law must prevail. This principle was made clear by Chief Justice Marshall when he stated for the court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons v. Ogden*, 9 Wheat. 1, 210-211, 6 L. Ed. 23. . . . The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors. One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. Notwithstanding this provision, the state awarded full title to the co-owner but required him to account for half the value of the bonds to the decedent's estate. Viewed realistically, the state has rendered the award of title meaningless . . . If the state can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased owner as a matter of law, the state has interfered directly with a legitimate exercise of the power of the federal government to borrow money. We hold, therefore, that the state law which prohibits a married couple from taking advantage of the survivorship provisions of the United States savings bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause."

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 167-168, 62 S. Ct. 491, 502-503:—Alabama officials, in enforcement of applicable state laws, seized for in-

spection and possible condemnation packing stock butter used by petitioner in the manufacture of process or renovated butter, and it was contended by petitioner that such state action was excluded by federal regulations concerning the manufacture of renovated butter. This court, sustaining petitioner's contention, said: "The manufacture and distribution in interstate and foreign commerce of process and renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states. . . . Its wholesome and successful functioning touches farm producers and city consumers. Science made possible the utilization of large quantities of packing stock butter which fell below the standards of public demand and Congress undertook to regulate the production in order that the resulting commodity might be free of ingredients deleterious to health. It left the states free to act on the packing stock suppliers prior to the time of their delivery into the hands of the manufacturer and to regulate sales of the finished product within their borders. But once the material was definitely marked for commerce by acquisition of the manufacturer, it passed into the domain of federal control. . . . Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

In the opinion of the District Court in the present case (R. 768), one sentence in the opinion in the *Cloverleaf Butter Company* case is cited in support of the judgment in this case, *viz.*: "But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the re-

quirements of the pure food laws of that state." This statement, made in reference to the scope of regulation undertaken by Congress in the statutes then in force with respect to the manufacture of renovated butter, manifestly did not give advance sanction to whatever local regulation of sales of the finished product might be enforced in Alabama regardless of constitutionality of such regulation, or regardless of supervening federal legislation and regulation that might be or become applicable to such sales, as in *McDermott v. Wisconsin* and similar cases.

Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 46 S. Ct. 279:—The Director of Agriculture of the State of Washington, acting pursuant to a quarantine law of that state, made an order prohibiting shipment into Washington of alfalfa hay from areas in Utah, Idaho, Wyoming, Oregon and Nevada said to be infested with an insect known as alfalfa weevil, not prevalent in Washington, and it was held that this quarantine order was precluded by the Act of Congress approved March 4, 1917 authorizing the Secretary of Agriculture of the United States to quarantine any state, territory or district of the United States when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease, or insect infection, not theretofore widely prevalent in the United States.

The opinion of the District Court in the present case cites *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, as compared with *Oregon-Washington R. & Nav. Co. v. Washington* (R. 768), but fails to note the differentiation between the two cases made in the opinion of this

court in the latter case, a differentiation even more pointedly applicable in the present case.

Chicago, Rock Island & Pacific R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426:—Reciprocal Demurrage Law of Minnesota held to be superseded by Act of Congress to Regulate Commerce, June 29, 1906, regulating the furnishing of freight cars for interstate transportation.

Erie R. Co. v. New York, 233 U. S. 671, 34 S. Ct. 756:—Law of New York limiting hours of work of railroad employees held unenforceable against interstate railway carrier, in view of Act of Congress approved March 4, 1917, entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service thereon." "When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist."

Southern R. Co. v. Railroad Commission of Indiana: —236 U. S. 439:—Indiana law requiring railway companies to place secure grab-irons and hand holds on the sides or ends of freight cars held to be superseded by the Federal Safety Appliance Act, providing for regulation of equipment of railroad cars.

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 S. Ct. 715:—Statute of South Carolina imposing a penalty on carriers for failure to adjust claims within forty days held to be an unconstitutional burden on interstate commerce, also in conflict with the provisions of the Act to Regulate Commerce, as amended June 29, 1906 (referred to as

the Carmack Amendment). The South Carolina statute was said to overlap the federal Act in respect of the subjects, the grounds, and the extent of liability for loss. Said Mr. Justice Holmes: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. The legislation is not to be saved by calling it an exercise of the police power."

In many cases adjudicated by this court in the last three decades, state legislation or administrative or judicial action affecting labor-management relations, held to be within the scope of regulation undertaken by the national government, has been declared inoperative, *e.g., Hill v. State of Florida*, 325 U. S. 538, 65 S. Ct. 1373—Florida statute requiring licensing of union business agents invalidated: *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026—Application of New York's Labor Law to permit unionization of foremen held to be precluded by National Labor Relations Act; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 16, 69 S. Ct. 379—Certification of union by the Wisconsin Board as collective bargaining representative of company's employees held to conflict with National Labor Relations Act; *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien*, 339 U. S. 454, 70 S. Ct. 781—Michigan statute regulating the calling of strikes declared unconstitutional; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 993, v. Wisconsin Employ-*

ment Relations Board, 340 U. S. 383, 71 S. Ct. 359—Wisconsin Public Utility Anti-Strike Law of 1949 declared unconstitutional; *Garner v. Teamsters, Chauffers and Helpers Local Union No. 776,* 346 U. S. 485, 74 S. Ct. 161, *Weber v. Anheuser-Busch, Inc.,* 348 U. S. 468, 75 S. Ct. 480, *San Diego Building Trades Council, etc. v. Garmon,* 359 U. S. 236, 79 S. Ct. 773, *Marine Engineers Beneficial Association v. Interlake Steamship Co.,* 82 S. Ct. 1237,—State court jurisdiction in labor-employer controversies barred when the controversies are found to be within the jurisdiction of the National Labor Relations Board, or arise from activities which might be subject to that agency's cognizance; *Railway Employes' Department v. Hanson,* 351 U. S. 225, 76 S. Ct. 714—Nebraska's constitutional provision prohibiting denial of work because of refusal to join a union held unenforcible to debar union shop agreement permitted under Railway Labor Act.

In the opinion of the District Court in this case, it is said: "The federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states if they comply with the shipping dates established by the federal order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms." (R. 767.)

Congress has said, in clear and explicit terms, that marketing agreements and orders of the kind described in the Marketing Agreement Act may be made by the Secretary of Agriculture in order to promote the orderly marketing of the enumerated agricultural commodities

in interstate commerce; that, among other things, such agreements and orders may include the establishment and enforcement of such standards of quality and maturity and such grading and inspection requirements as will effectuate such orderly marketing of the specified commodities as will be in the public interest. (7 U. S. C. A. Sec. 602(3), *infra*, p. 89.) Florida Avocado Order No. 69 is an admittedly valid order made by the Secretary of Agriculture to carry out the purposes of the Marketing Agreement Act. The order applies to "all varieties of avocados grown in the production area" and governs the handling of these avocados. "Handle," as defined in the order, means "to sell, consign, deliver, or transport avocados within the production area and any point outside thereof in continental United States or Canada." (R. 20, Secs. 969.5 and 969.10 of order.) The order further provides: "Whenever the handling of any variety of avocados is regulated pursuant to Sec. 969.51, each handler who handles avocados shall, prior thereto, cause each lot of avocados handled to be inspected by the Federal-State Inspection Service and certified by it as meeting the applicable requirements of such regulation." (R. 29, Sec. 969.54 of order.)

What the District Court seems to say, in effect, is that such inspection and certification of the avocados by the designated governmental agency operates only as a permit to apply to the officials of each state for leave to sell, consign, deliver, or transport the avocados within its borders, nothing more. The federal law and the Florida avocado marketing order, on the contrary, make it clear and explicit that the matter regulated is the marketing of these avocados in all states of the Union,

and there was no need to add an admonition that such regulation was to be operative in California, as well as in all other states. As was said by this court in *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U. S. at p. 772, 67 S. Ct. at p. 1029: "It has long been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

II.

Section 792 of the Agricultural Code of California, when applied to avocados grown in Florida and shipped for sale in California, imposes arbitrary conditions upon the importation and sale of legitimate and wholesome products of another state and thereby contravenes the Commerce Clause of the United States Constitution.

In the opinion of this court by Mr. Justice Jackson, in *H. P. Hood & Sons, Inc. v. Dumond,* 336 U. S. 525, 69 S. Ct. 657, after pointing out that a foremost purpose prompting the making of the Constitution was to do away with state laws hindering the free flow of trade between the states, it was said: "The material success that has come to the inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free ac-

cess to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any. Such was the vision of the founders; such has been the doctrine of this court which has given it reality." (336 U. S. at pp. 538-539, 69 S. Ct. at p. 665.)

Avocados grown in Florida have been barred from sale in California for failure to pass California's 8% oil test, though otherwise of unquestioned quality. It is stated in the opinion of the District Court that in the year 1925 practically all of the avocados produced in the United States came from California; that California then adopted the requirement that all avocados marketed in that state shall contain at least 8% of oil; that there was then and still is a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity. (Opinion, R. 759.) To what body of scientific opinion the court refers is not apparent from the record of this case. More pertinent to the present controversy, however, is the fact that the court's statement refers to the avocados produced in California, not to the avocados produced in Florida.

The only testimony on the subject of the maturation of avocados of the varieties grown in Florida is that of Dr. Paul L. Harding, of the U. S. Department of Agriculture, and Dr. Roy W. Harkness, of the University of Florida. (*Supra*, pp. 10-30.) Virtually all of the modern learning on the subject is presented to

the court by this testimony. In no iota is the testimony of these witnesses contradicted or impugned. On the record before this court, no assertion or finding by the trial court regarding the determination of maturity of the Florida avocados merits consideration unless it can be said to be supported by the testimony of these witnesses.

It is admitted that "Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% oil requirement." (Opinion, R. 766.) But it is asserted, however, that exclusion of these varieties from the California market is of no practical commercial consequence because of poor shipping qualities and short shelf life. (Opinion, R. 766; also Findings 8 and 10, R. 780.) This is, of course, a *pro tanto* confession of appellants' case, attempted to be avoided by invoking the *de minimus* maxim.

First, the national interest in freedom of commerce between the states is not so lightly to be bargained away. To borrow the words of Mr. Justice Douglas, in his dissenting opinion in *Eli Lilly and Company v. Sav-On-Drugs, Inc.*, 366 U. S. 276, at p. 292, 81 S. Ct. 1316, at p. 1326: "This case on its own may do little injury. But it provides the formula whereby a State can stand over the channels of interstate commerce in a way that promises to do great harm to the national market that heretofore the Commerce Clause has protected."

It is indeed a dubious undertaking, to say the least, for a court to pass judgment upon the commercial practicability of marketing a particular variety of avocados at a given time of the year and over a given distance,

let alone to make such a judgment a basis for the determination of constitutional rights. Yet such a judgment was made by the District Court merely on the say-so of two Calavo salesmen, without specification of any instance or instances claimed to demonstrate the asserted impracticability of marketing any of the varieties of the Florida avocados in California. (*Supra*, pp. 35-38.) These same witnesses, on cross-examination, admitted that the Calavo organization during a span of years made sales of approximately a million dollars worth of Florida avocados annually in all parts of the United States, including particularly sales in the southwestern and Pacific Coast states, and including sales of the West Indian varieties of Florida avocados in all states except California.

Second, equally unsupported by substantial evidence, is the finding (No. 8, R. 780) that the West Indian varieties of avocados grown in Florida are of declining commercial importance. This finding is derived merely from a mathematical computation that the shipments of West Indian varieties of Florida avocados (not identified) in the 1959-60 crop season amounted to approximately 12% of all shipments of Florida avocados in that season, as against 20% in the 1955-56 season. Shipments in the two particular seasons are selected for comparison with no evidence that the growing conditions affecting the West Indian varieties of avocados were essentially the same in the 1959-60 season as in the 1955-56 season. To make such a comparison meaningful, account must be taken of the innate characteristics of the particular varieties, whether the trees on which they grow yield fruit every year or only in alternate years, whether these trees are especially susceptible

to injury by violent windstorms, frosts, or other vicissitudes of nature, and if they are blown down how long a time elapses before they are restored and start to yield again. Obviously, the Waldin avocados, most important commercially of the West Indian varieties, did not drop from 50,259 bushels in the 1955-56 season, and 60,261 bushels in the 1957-58 season, to 12,808 bushels in the 1959-60 season because of sudden decrease in commercial importance, but rather because of havoc suffered from the forces of nature.

Both Dr. Harkness and Dr. Harding, when asked to name the varieties of Florida avocados of major commercial importance, included the West Indian Waldin and Pollock varieties. (R. 250, 590.) Appellees' witnesses Presley Wiggs and Albert C. Jones testified that the Calavo organization sold West Indian varieties of Florida avocados throughout the United States, except in California, and named in particular the Fuchs, Pollock, Trapp and Waldin varieties. (R. 669, 675.) Harold E. Kendall, president of appellant South Florida Growers Association, Inc., included the Waldin and Pollock as major Florida varieties, and added that the Waldin has been planted in some quantity during the past ten years, also that the Trapp is a heavy producer in some years. (R. 255.)

Third, the attempt to segregate the West Indian varities of Florida avocados as the only varieties unable to meet the California 8% oil test, coupled with cynical dismissal of like difficulty in the case of all other varieties as due to temptation to rush immature avocados to market at the start of the season (R. 759, also Findings 4 and 11, R. 779, 780), flaunts the evidence that no

varieties of Florida avocados attain 8% oil content with the timeliness and consistency essential for effective participation in the California market. (*Supra,* pp. 10-33.) Practically all of the avocados shipped to California have been of the Lula variety only, and application of the 8% oil requirement has restricted such shipments to sporadic sales at an advanced stage of the marketing season. Even then, as appears from plaintiffs' exhibits 17 and 21 (R. 438, 443), several of such shipments have been rejected in California by imposition of the 8% oil test, to the extreme of a shipment of Lulas that left Florida on December 8, 1955—more than two months after commencement of the marketing of Lulas in the 1955-56 season—and was barred from sale in California upon test of oil content, then reshipped to El Paso, Texas, and resold at loss of $1,651.28. (R. 443-444.)

As to any and all varieties of avocados grown in Florida, appellants submit, exclusion from sale in California is an indefensible interference with the freedom of interstate commerce. Neither by legislative fiat, nor by judicial pronouncement, can these avocados be branded as immature simply because they do not contain 8% of oil, when nature speaks to the contrary. Intensive research by highly competent scientists, conducted continuously since Dr. Harkness began his research project on the determination of maturity of these avocados more than ten years ago, has established indisputably that there is no direct relation between oil content and maturity of these avocados and that percentage of oil content is not a valid determinant of maturity. (*Supra,* pp. 10-30.)

The record of this case is devoid of a shred of evidence indicating imperfection of any kind in the Florida avocados, unless inference of immaturity may be made from oil content below 8%, contrary to all the evidence in the case relating to Florida avocados. Appellees' witness H. W. Poulsen, Chief of the Division of Standardization and Inspection Services of the California Department of Agriculture, testified that all he knew about the Florida avocados that were rejected for sale in California was that it was reported to him that they had failed to pass the 8% oil test. (R. 640.) Dr. David Appleman, witness for appellees, stated that he had never conducted research dealing with the determinaton of maturity of avocados, but had used avocados as a subject matter in other research work, that all the work he has done with avocados has been with the two leading California varieties, the Fuerte and Hass, both of extremely high oil content; that he knows nothing at all about Florida avocados. (R. 658.)

Again referring to the testimony of Presley Wiggs and Albert C. Jones, relating to the marketing of Florida avocados by the nationwide Calavo marketing agency over the period from 1939 to 1958 (R. 668-669, 675), these witnesses raised no question whatever regarding the quality of these avocados in any respect, but only question of the commercial profitability of marketing the West Indian varieties in California in view of the time of transit from Florida. The Calavo sales included Florida avocados of the lowest oil content, the Fuchs, Pollock and Trapp, with oil content seldom more than 3%, and the Waldin with oil content ranging from about 3% to 5%. (Plaintiffs' exhibits 16 and 25, R. 389-438, 483-485.) Also in-

cluded in the Calavo sales were the resales in Arizona, Oregon and Utah, as agent for the appellant South Florida Growers Association, of several loads of Florida avocados rejected in California for failure to pass the 8% oil test. (Plaintiffs' Exhibit 17, R. 438.) It is to be assumed that Calavo would not have undertaken the marketing anywhere in the United States of Florida avocados deemed to be deleterious or of inferior quality.

It is said in the District Court opinion that what the appellants want is license to sell in California the Florida avocados of which they are handlers before these avocados reach "prime condition" and are only "acceptable," thus to "jump the gun" in order to get the high prices which prevail at the start of the season. (R. 766.) What may be the difference between "acceptable" and "prime condition" is not elucidated. There is, however, no declaration by the court that "acceptable" avocados are unhealthful or otherwise fit only to be condemned in the proper exercise of state police power. In connection with this statement, the court refers to the testimony of Dr. Harding, but search of the record fails to reveal anything said by Dr. Harding that supports the court's aspersion. In answer to interrogation by his honor Judge Bone, Dr. Harding stated that all avocados raised in Florida and shipped out of the state are in full compliance with the federal requirements. He added that "The avocados that are shipped certainly meet consumer acceptance and are palatable." (R. 582.) At a later point, Dr. Harding was questioned by his honor Judge Halbert as to the percentage of Florida avocados that never reach 8% oil content and the estimate of the witness was 40%. (R. 617.)

As to other varieties of Florida avocados, among them the volume leaders, Dr. Harding stated that at some time in the life of these avocados, if left on the tree long enough, some might attain 8% oil content, but that this maybe would be the last 20% of the shipment of these varieties. (R. 618.) Citing the Waldin and Booth 8 as examples, Dr. Harding stated that the avocados of these varieties are acceptable and desirable before they attain 8% oil content; that although they may not then have reached prime condition, "They are mature; they are acceptable; they are pleasing to the taste." (R. 619.) As to the Waldin, in particular, he added that by the time this variety might reach 8% oil content, "You would probably have all your crop drop," and as to the Booth 8, "You would probably shorten the season far beyond what it should be shortened, and with some of the other varieties the same way." (R. 619.) In summation: "It would mean that in the case of some of these the crop would be on the ground. In the case of others they may be overripe and not have carrying quality. In other words, you couldn't ship them any length of time or any distance. So in reality it would affect it the same way. It would mean that they would be practically unmarketable." (R. 620.)

Affirmatively, the oil content tests of Florida avocados made by Dr. Harkness, together with the maturity and palatability tests made under the direction of Dr. Harding, demonstrate that there is no correlation between the oil content of the varieties of avocados grown in Florida and the maturity and quality of these avocados. With no counter-testimony, it is evident that enforcement of California's 8% oil content requirement to bar sale of this fruit in that state is an im-

permissible restriction of the freedom of commerce between the states, by application of a standard irrelevant to the maturity and quality of the Florida fruit.

This is not a case of slight incidental effect upon interstate commerce of enforcement of an appropriate police regulation serving to protect the safety or health of the local inhabitants. It is, instead, a case in which the effect of the challenged state regulation, in application to the avocados grown in Florida, is to restrict sale in California of the fruit grown in another state by a measure unsupported by health or safety considerations, but effective to give the producers of California avocados competitive advantage over the producers of Florida avocados, at the same time the benefit of a protected market in which to sell their fruit to the local consumers. This result follows from the adventitious circumstance that most of the avocados grown in California are innately of high oil content, far above the required 8%, while those grown in Florida are predominantly of oil content less than 8%, but not for that reason less healthful or of inferior quality.

The only testimony that might have a bearing on the healthfulness or unhealthfulness of avocados relates to the California avocados of high oil content, not to the Florida avocados. Appellees' witness Dr. Appleman was asked about the character of the fat in the avocado and answered that a large proportion of this fat is unsatured, therefore less stable than saturated fat and more active in the process of digestion and metabolism; that recently the medical men have found that the unsaturated fats are less likely to form cholestoral bodies in the blood stream, along the walls of the arteries. (R. 651.) Why appelles saw fit to offer this reassurance

regarding the character of the fat in avocados is obscure, perhaps to palliate denial to the residents of California of unrestricted opportunity to choose the avocados of low oil content.

It is immaterial with what intent and upon what information the challenged California regulation was originally conceived; it is to be considered in the light of its present-day operation and the applicable present-day agricultural science. (*Nashville, Chatanooga & St. Louis Ry. v. Walters,* 294 U. S. 405, 414-415, 55 S. Ct. 486, 488, and cases cited in footnotes 5 and 6.) It is immaterial also that the regulation is enforced against the avocados grown in California as well as those grown in Florida, if the effect of enforcement against the Florida avocados is to obstruct or restrict interstate commerce without valid police justification. That such enforcement is prohibited by the Commerce Clause of the Constitution, without aid of implementation by congressional action, is established by numerous decisions of this court, among them the following:

Minnesota v. Barber, 136 U. S. 313, 10 S. Ct. 862: —A Minnesota statute prohibiting sale in that state for human food of cattle, sheep and swine not inspected and found healthy by a local Minnesota inspector within twenty-four hours before slaughter of the animals was held to be an unconstitutional interference with the freedom of interstate commerce. As pointed out in the opinion of the court by Mr. Justice Harlan, the practical effect of this requirement of local inspection was to restrict the slaughtering of animals whose meat was to be sold in Minnesota for human food to those engaged in such business in that state, since the time, expense and labor of sending animals from points outside Minne-

sota to be there inspected, and then to be brought back to be slaughtered within twenty-four hours after the inspection, amounted to an absolute prohibition upon sale in Minnesota of meat from animals not slaughtered in that state.

The basic principles underlying the decision in *Minnesota v. Barber* are applicable to the present case: that the validity of a state statute affecting interstate commerce is to be judged by its practical operation; that a burden imposed upon interstate commerce by application thereto of a state enactment is not to be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the state enacting such statute; that no judicial tribunal can with propriety assume that the people of a state who may desire to purchase the food products of another state may not, with due regard to their health, rely upon inspections of the products in the states of origin; that the people of the state, in this instance California, have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of the other states.

In the present case, avocados grown in Florida are excluded from sale in California by application thereto of an 8% oil content requirement that has no horticultural validity as a determinant of the maturity or quality of this fruit. While the District Court stresses the fact that this requirement is applied also to the avocados grown in California, the fact that most of the avocados grown in California are of varieties that of their nature have oil content far in excess of the required 8% is ignored. It is the growers and handlers of these avocados of high oil content who alone derive

advantage from exclusion of the competitive Florida avocados, to the detriment not only of the producers and handlers of the Florida fruit but also to the potential purchasers and consumers of the fruit in California.

Brimmer v. Rebman, 138 U. S. 78, 11 S. Ct. 213:—A Virginia statute of the same kind held unconstitutional in *Minnesota v. Barber* was likewise held to have no real or substantial relation to the avowed object of protecting the people of the state against sale of unwholesome meat.

Dean Milk Co. v. City of Madison, 340 U. S. 349, 353-356, 71 S. Ct. 295, 297-299:—An ordinance of the City of Madison, Wisconsin, making it unlawful to sell any milk in that city as pasteurized unless processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of the city, also unless obtained from a source of supply possessing a permit issued after inspection by Madison officials, such inspection not required to be made on farms located more than twenty-five miles from the center of the city, was held to impose an undue burden on interstate commerce, in violation of the Commerce Clause of the Constitution.

In the opinion of the court by Mr. Justice Clark, it was conceded that the avowed purpose of the ordinance, to protect the health of the people of Madison by regulating the sanitary conditions under which milk coming into the city was produced, was within the police power of the city. It was held, however, that the challenged regulations went beyond the reasonable and permissible exercise of such police power. To quote from the opinion: "But this regulation, like the provision invalidated in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S.

511, 55 S. Ct. 497, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available. . . . To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.' *Baldwin v. G.A.F. Seelig, Inc.*, 294 U. S. at p. 527, 55 S. Ct. at p. 502."

It is added, in footnote 4: "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."

It was urged, in the dissenting opinion of Mr. Justice Black, that the Madison ordinance imposed no substantial discriminatory burden on interstate commerce; that the appellant Dean Milk Company, an Illinois distributor of milk and its products, could as a practical matter easily comply with the ordinance if it so desired; that "Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison." In the present case, by contrast, there is nothing at all the

producers and distributors of Florida avocados can possibly do to meet California's 8% oil content requirement if they wish to sell their fruit in that state, since they cannot alter the laws of nature accounting for the growth in Florida of avocados that come to maturity with less than 8% oil content.

Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334: —A North Carolina statute levying an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in a hotel room occupied temporarily for the purpose of securing retail orders, was held to be in contravention of the Commerce Clause of the Constitution. Quoting from the opinion of the court by Mr. Justice Reed: "The Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. . . . Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hos-

tile an atmosphere. . . . The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 79 S. Ct. 962:—An Illinois statute requiring use of contour rear fender mudguards on trucks and trailers operated on the state highways, rather than the usual straight mudguards in general use in other states, although claimed to be a safety measure to avoid the throwing of debris into the face of a passing driver or into the windshield of a following car, was held to impose an unconstitutional burden on interstate commerce. The opinion of the court by Mr. Justice Douglas concludes: "We deal not with absolutes but with questions of degree. The state legislatures plainly have great leeway in providing safety regulations for all vehicles—interstate as well as local. Our decisions so hold. Yet the heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations."

By parity of reasoning, although there is no question of the power of a state to adopt appropriate standardization laws regulating the sale of its agricultural products, the Commerce Clause of the Constitution debars use of this power to burden and restrict interstate commerce by unjustifiable application of such a state law to the agricultural product of another state, as in the present case.

Finally, in this phase of the argument, attention is directed to the case of *Edwards v. California*, 314 U. S. 160, 62 S. Ct. 164, dealing with the movement of a human being from one state into another. Under a law of California making it a misdemeanor to bring into the state an indigent person who was not a resident of the state, knowing him to be an indigent person, the appellant Edwards was adjudged guilty of the offense because he brought into California his wife's brother, a citizen of the United States residing in Texas, knowing him to be unemployed and penniless. All members of this court agreed that the judgment should be reversed, the majority on the ground that the statute imposed an unconstitutional burden upon interstate commerce, the minority on the ground that the statute ran afoul of the Privileges and Immunities Clause of the Fourteenth Amendment.

Of special interest, in relation to the present case, is what is said in the opinions about the power of a state to deny admission into its borders of an "indigent person," or "pauper." Mr. Justice Byrnes, delivering the opinion of the court, said: "In *City of New York v. Miln*, 11 Pet. 102, at p. 143, 9 L. Ed. 648, it was said that it is 'as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possible convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported.' . . . This language has been casually repeated in numerous later cases up to the turn of the century. . . . *City of New York v. Miln* was decided in 1836. Whatever may have been the notion then prevailing, we do not think it will now be seriously con-

tended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."

To say of the Florida avocados, in effect, that maturity and 8% oil content are synonymous, is no more defensible than to say that poverty and immorality are synonymous. The appellees, in strategic retreat, concede that the West Indian varieties of Florida avocados reach maturity with less than 8% oil content, but ask for a judicial determination that it would not be profitable to market these avocados in California, no matter where else they are marketed. Then, as to the West Indian-Guatemalan hybrid varieties of Florida avocados, it is urged that some time in the marketing season for these varieties they attain 8% oil content and may be marketed in California, an argument counter to the unrefuted evidence (1) that oil content is at no time a scientifically valid determinant of maturity of any of the varieties of avocados grown in Florida, (2) that the hybrid varieties, in fact, reach maturity with less than 8% oil content, (3) that the hybrid varieties never attain 8% oil content with the consistency and certainty necessary to avoid risk of condemnation if shipped to California, and essential to the effective marketing of these avocados in California, and (4) that as a matter of practical experience, shipments of hybrid avocados to California have been limited almost entirely to the Lula variety, shipments long after these avocados have reached maturity and have been in course of marketing throughout the country, shipments that have resulted in substantial losses because of failure to meet the California 8% oil test.

Appellants submit that obstruction of the marketing of the Florida avocados in California, by imposition of the 8% oil content requirement, violates the freedom of commerce among the states protected by the Commerce Clause of the Constitution, as interpreted and applied in the decisions of this court, therefore should be enjoined.

III.

Exclusion from sale in California of avocados grown in Florida, which are wholesome and palatable but of their nature have less than the 8% oil content required by Sec. 792 of the Agricultural Code of California, denies to appellants the equal protection of the laws called for by the Fourteenth Amendment.

Application to the Florida avocados of the 8% oil content requirement, as a condition precedent to sale of these avocados in California, is clearly arbitrary, since the evidence shows without contradiction that oil content is not a valid indicant of the maturity or quality of these avocados. A classification of all avocados with 8% oil content as wholesome and fit for sale, and all avocados with less than 8% oil content as a public nuisance fit only for condemnation (Sec. 785 of Agricultural Code of California, *infra*, p. 83), regardless of the innate characteristics and conditions of growth of the many different varieties of avocados, has no rational support in horticultural science and no rational relation to the purpose of protecting the people of the state from purchase and consumption of unwholesome fruit. Invidious discrimination results, in favor of the producers and handlers of the high oil con-

tent avocados grown in California and against the producers and handlers of the low oil content avocados grown in Florida, when the California 8% oil requirement is applied to the Florida avocados shipped for sale in that state.

The arbitrariness of the 8% oil standard, in application to the Florida avocados, is illustrated by other fruit maturity standards in the Agricultural Code of California. With respect to grapes, recognition is given to the differences in the characteristics of the numerous varieties, as well as differences in climatic conditons in the areas where they are grown, resulting in differences in percentage of soluble solids called for at maturity. (Deering's California Codes, Agriculture, 1962, Secs. 799 and 802.) Sec. 796, relating to grapefruit, establishes one standard of maturity for grapefruit grown in "the desert areas," defined as Imperial County and portions of Riverside, San Diego and San Bernardino counties, and a different standard of grapefruit grown in "other areas of the state." As to apples, comprehensive amended and added maturity provisions were adopted in 1957, giving recognition to the differences in varieties, also differences of climatic conditions in the various areas in which the fruit is grown. (Secs. 827-827.7.) Secs. 827.1, 827.2 and 827.7 provide as follows:

"Sec. 827.1. *Date of maturity for designated varieties: Determination and announcement: Rules and regulations: Basis of determination.* As to apples produced in California, the commissioners, under the supervision of the director, may determine, prior to the harvesting season, that apples of designated varieties in any area, county, or district within a county, are or

will be considered to be properly matured on a specified date, which date shall be announced by the commissioners. Designation of varieties shall be on the basis of availability of adequate data covering the known factors which determine maturity. The director may promulgate and adopt rules and regulations to establish minimum maturity standards for apples of designated varieties in any area, county, or district within a county. The determination as to maturity shall be based upon known factors of maturity, including soluble solids content of the juice, pressure test, size, color, condition of the flesh or other recognized methods of measuring the maturity of apples. (Added by Stats. 1957, ch. 879, sec. 2.)"

"Sec. 827.2. *Same: Dates of maturity: Establishment: Basis: Records.* Dates of maturity shall be established by the commissioners, under the supervision of the director, for areas, counties, or districts within counties, taking into consideration location, climatic conditions or other factors which are known to produce apples which vary as to dates of maturity. Such dates of maturity shall be based upon an investigation including the testing of the apples from representative orchards in each area and shall be set when such tests generally indicate that the apples in each such area are or will be properly matured. The commissioners shall prepare records, based on the factors of maturity used each year, and shall submit them to the director. (Added by Stats. 1957, ch. 879, sec. 3.)"

"Sec. 827.7. Same: Apples shipped into California from outside State: Exception from Secs. 827.1-827.6: Maturity requirements. The provisions of Sections 827.1 to 827.6, inclusive, do not apply to apples

shipped into California from outside of the State; however, such apples shall be properly matured as required in Section 821 or accompanied by an official certificate stating that such apples, at the time of harvest, met the maturity requirements of the state of origin. (Added by Stats. 1957, ch. 879, sec. 8.)"*

The eclectic maturity provisions aforesaid as to apples, adopted in the light of present-day agricultural science, are in sharp contrast with the rigid monolithic standard for determination of maturity of avocados established in 1925 and retained without change since that time. An exercise of police power, even if defensible and constitutional when initiated, gains no sanctity by lapse of time but must withstand the test of appropriateness and reasonableness in present-day enforcement.

For recent exposition of the meaning and force of the Equal Protection Clause of the Fourteenth Amendment, reference is made to the opinion of the court by Mr. Justice Burton in *Morey v. Doud*, 354 U. S. 457, 464-469, also the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 82 S. Ct. 248, 258-261, and the concurring opinion of Mr. Justice Clark in *Baker v. Carr*, 82 S. Ct. 691, 727-734. In the light of the holdings of this court in these cases and earlier cases therein cited, appellants submit that equal protection of the laws is denied to them by application to the Florida avocados of California's 8% oil content test as the determinant of maturity, since on the record of

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*It is noted, incidentally, that the Florida standardization statute adopts all fruit and vegetable standards promulgated by the United States Department of Agriculture. (Florida Statutes Annotated, Vol. 17, Secs. 603.11 and 603.12.)

this case it is indisputable that percentage of oil content has no validity in horticultural science as a determinant of maturity of these avocados; that exclusion from sale in California of Florida avocados which reach maturity with less than 8% oil content has no rational relation to the avowed purpose of protecting the people of California from purchase of immature or unwholesome fruit, and that the effect of application of the 8% oil content requirement is merely to give competitive advantage to the growers and handlers of the avocados produced in California.

Conclusion.

Appellants submit that the judgment of the District Court denies effect, in a principal segment of the national market, to the regulation of the interstate marketing of the avocados produced in South Florida undertaken by the national government. The Supremacy Clause of the Constitution forbids such disregard and frustration of a federal program to protect the national economy by restoring and maintaining the orderly marketing of agricultural commodities. Further, the judgment sanctions unjustifiable obstruction of the freedom of commerce among the states, in contravention of the Commerce Clause of the Constitution, and denies to appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

Wherefore appellants pray that this court may reverse the judgment of the District Court, with directions to grant the relief prayed in appellants' complaint.

Respectfully submitted,

ISAAC E. FERGUSON,
Attorney for Appellants.

APPENDIX.

Agricultural Code of California, Division V, Standardization.*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lots of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag; Detachment, alteration, etc., unlawful.) The officer may fix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in

*Deering's California Codes, Agriculture, 1962 edition.

such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owners.) If the person so served is not the sole owner of the lot; or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed there-

from. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 606, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 785.6. Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered. Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include

apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.*

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

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*Legislative history of Section 792, Deering's Agricultural Code, page 240.

Agricultural Marketing Agreement Act of 1937.*

7 U. S. C. A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U. S. C. A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards * * *

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level

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*The Agricultural Marketing Agreement of June 3, 1937 (7 U. S. C. A. Secs. 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U. S. C. A., p. 337.)

at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-602, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 607, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-19, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the

supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U. S. C. A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * *

7 U. S. C. A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said sections. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 160, Title II, §206(d), 61 Stat. 208.

7 U. S. C. A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are

referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts and Connecticut, and not including fruits for canning or freezing other than olives, grapefruit, cherries, cranberries, and apples produced in the states above named except Washington, Oregon and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend

to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subjection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, pro-

duced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

* * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* that no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

Regional application

(11)(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several

orders applicable to the several regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601-608, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

* * * * *

Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 49

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida Corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Northern Division, is reported in 197 F. Supp. 780 (1961).

JURISDICTION

Handlers'[1] action was brought under 28 U.S.C. 1331 and 1345 to enjoin appellant state officers[2] from enforcing California Agricultural Code, Section 792, as unconstitutional and as being in conflict with federal statute. R. 1. Final judgment dismissing handlers' action was entered in the district court on September 22, 1961, and state officers' direct appeal was timely filed in that court on November 3, 1961. 28 U.S.C. 2101(b). R. 222, 223. Handlers' complaint poses the issue of the constitutionality of the state statute under the three-judge district court procedure under 28 U.S.C. 2281, and this Court has appellate jurisdiction over state officers' direct appeal under 28 U.S.C. 1253. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960). R. 1. Probable jurisdiction was noted by this Court on January 15, 1962, 368 U.S. 965.

STATUTES INVOLVED

California Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

[1] Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., hereafter referred to as "handlers."

[2] Charles Paul, Director of Agriculture, Edmund G. Brown, Governor, and Stanley Mosk, Attorney General, hereafter referred to as "state officers."

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 68 Stat. 906, 7 U.S.C. 608(c), et seq. are set forth in the Appendix.

QUESTION PRESENTED

Whether the district court erred in entering judgment dismissing the action on the merits instead of dismissing for want of equity jurisdiction?

STATEMENT

Handlers are Florida corporations. R. 554. Their complaint sought injunction restraining state officers from enforcing California Agricultural Code, Section 792, on the ground of its invalidity under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended 68 Stat. 906, and as unconstitutional under the Commerce Clause and under the Equal Protection Clause of the 14th Amendment of the Constitution. R. 1.

No officer or employee of either handler testified at the trial held February 7 and 8, 1961. R. 557-685. Instead, handlers' case consisted of the production of one witness, Paul Louis Harding, Supervisory Plant Physiologist, United States Department of Agricul-

ture, whose testimony related to the palatability and maturation of the avocado fruit. R. 558-622. Handlers at the trial also offered in evidence *en masse*, and without reading, the complete deposition transcripts of five witnesses, totaling 207 pages, together with attached exhibits of 92 pages. R. 144-445 (O.P.); R. 576 (O.P.).[3] The state officers objected and asked that the depositions be read question and answer at a time, and exhibits offered individually, in order that specific objections could be made. R. 576. These objections were renewed at the conclusion of the handlers' case (R. 625) and again at the conclusion of the trial (R. 683-684). The trial court reserved ruling on the admissibility of the depositions and exhibits pending the filing of the written argument of counsel. R. 576, 625, 683-684.

In a post trial formal order, the trial court ruled on these reserved objections and held that the handlers' depositions and their attached exhibits were excluded from evidence. R. 782.

The district court found that California's maturity standard requiring a minimum of 8 percent of oil is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California. R. 779. These hybrid and Guatemalan varieties, which constitute approximately 88 percent of total Florida commercial shipments, exceed 8 percent oil content while in a prime commercial marketing condition. R. 780, 517.

[3] Testimony and exhibits not admitted into evidence but included in the record as an offer of proof, are designated R. ___ (O.P.).

The court also found that West Indian varieties grown in Florida are of declining commercial importance, dropping from approximately 20 percent of total Florida commercial shipments in the 1955-56 shipping season to approximately 12 percent in the 1959-60 shipping season. R. 780. Moreover, the Florida West Indian varieties have such poor shipping qualities and short retail grocery store shelf-life, that shipment across the continent for marketing in California is not commercially feasible, even in the absence of the California 8 percent oil content statute. R. 780, 666-667.

Handlers made no attempt to market their Florida avocados in California in the business years ending March 31, 1959, and ending March 31, 1960, and there was no proof of any attempt to market their avocados in California from March 31, 1960, to the date of trial, February 7, 1961. R. 780. On these facts, the district court found that handlers "have neither suffered nor been threatened with irreparable injury," and concluded as a matter of law that handlers' evidence failed to establish a case within its equity jurisdiction. R. 781.

In its memorandum decision, the district court stated:

> "If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs. (See: *Watson* v. *Buck*, 313 U.S. 387; *A.F. of L.* v. *Watson*, 327 U.S. 582)." 197 F.Supp. 780, 784.

Nonetheless, the district court exercised its equity jurisdiction because it considered itself under a mandate from this Court to decide the case on the constitutional merits.

This Court in the previous appeal held that handlers' complaint alleged facts showing the existence of "a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86. Because of the district court's conclusion that this language left it no discretion to decline equitable jurisdiction, the district court reached the merits of the posed constitutional issue. 197 F. Supp. 780, 784.

On the merits, the district court held that the state enactment was constitutionally valid under the Commerce Clause and under the Equal Protection Clause of the 14th Amendment. R. 781. The California act was also found to be consistent with the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 608(c), and with the implementing marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture. 7 C.F.R. Pt. 915. R. 15. Handlers' action was therefore dismissed on the merits by formal judgment entered September 22, 1961. R. 783-784.

SUMMARY OF ARGUMENT

A. Handlers are Florida corporations who market avocados grown in South Florida. No evidence was adduced by them at the trial which would show that the California 8 percent avocado oil content standard

had ever interfered with their marketing operations in California. As the district court held, handlers have neither suffered nor been threatened with irreparable injury and their evidence failed to establish a case within that court's equity jurisdiction. Having found a lack of equity jurisdiction, the district court should not have reached the constitutional issues posed in handlers' complaint. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935); *Douglas* v. *Jeannette*, 319 U.S. 157, 162-165 (1943).

B. The district court erred in assuming that this Court's remand from the previous appeal left the district court ". . . no discretion to decline equitable jurisdiction. . . ." 197 F. Supp. 780, 784. This Court in the previous appeal decided only that there was a justiciable case or controversy which gave the district court jurisdictional power to hear the case; this Court did not decide any other questions which could arise in the further progress of the litigation, including the question whether the district court should, as a matter of discretion, decline to exercise its equity jurisdiction. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 86 (1960). The question whether handlers' case fell within the equity jurisdiction of the district court remained, after remand, a part of the existing dispute between the parties which required resolution by the district court.

C. Neither state officers nor handlers in the questions presented set forth in their jurisdictional statements, October Term, 1962, Nos. 45 and 49, ques-

tioned the evidenciary rulings of the district court. Handlers may not, therefore, question the correctness of these rulings on appeal. Rule 40(2), Revised Rules, Supreme Court of the United States; *General Talking Pictures* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938). In any event, the lower court correctly excluded from evidence handlers' depositions of five witnesses and the attached 22 exhibits. These depositions were offered in evidence *en masse* and without reading by handlers, and with no foundation having been laid justifying their admission under the Federal Rules of Civil Procedure. R. 576; 144-445 (O.P.).

ARGUMENT

I. HANDLERS' ACTION SHOULD HAVE BEEN DISMISSED UPON THE GROUND THAT IT FAILED TO ESTABLISH A CASE WITHIN THE EQUITY JURISDICTION OF THE DISTRICT COURT.

A. Handlers' Evidence Failed to Establish the Exceptional Circumstances Showing That an Injunction Against State Officers Is Necessary to Afford Adequate Protection of Constitutional Rights.

Handlers complain that the California avocado maturity statute as applied to them is invalid by reason of the paramount provisions of the Constitution and of federal statute. But there was a complete failure of proof showing that the California avocado maturity law had ever caused injury or otherwise violated their rights. Neither did handlers show that their marketing operations came within the federal avocado marketing regulations. Handlers' case in

chief consisted solely of the testimony of one witness whose statements described the maturation and palatability of the avocado fruit. R. 558-622. The nature of handlers' injury and the scope of the official conduct challenged, remain shrouded in uncertainty. On this record, handlers have not shown themselves to be immediately harmed, or immediately threatened with harm. The findings of the district court, that handlers ". . . have neither suffered nor been threatened with irreparable injury"; and their ". . . evidence fails to establish a case within the equity jurisdiction of this [District] Court" were therefore manifestly correct. R. 780-781. Indeed, handlers conceded this to be true since they did not contest the correctness of these findings in the questions presented set forth in their jurisdictional statement filed in No. 45, of the 1962 term of this Court.

Neither party in their questions presented has challenged the evidenciary ruling of the district court excluding from evidence handlers' depositions and attached exhibits. Therefore, there is no issue on the appeal to which the contents of these excluded depositions and exhibits would be relevant. But even if considered as an offer of proof, their contents may not be considered on appeal for the purpose of deciding on the merits whether the evidence supports the findings of the district court that handlers ". . . have neither suffered nor been threatened with irreparable injury." R. 780. *Idaho and Oregon Land Co.* v. *Bradbury,* 132 U.S. 509, 518 (1889). To do so

would prejudice the right of state officers, specifically reserved by the district court, to introduce rebuttal evidence in the event it was decided on appeal that the district court prejudicially erred in excluding these depositions and exhibits from evidence. R. 782.

Lastly, even if they were properly before the Court, these depositions and exhibits would fail to establish a case within the equity jurisdiction of the district court. Handler Florida Lime and Avocado Growers, Inc., was incorporated in Florida on April 6, 1956 (R. 554) and marketed avocados in California during the 1956-1957 and 1957-1958 shipping seasons R. 443 (O.P.).[4] The *only* interference by the California authorities with these marketing operations occurred with respect to one lot of avocados in November of 1957, on which no loss is claimed by this handler. Pl. Ex. 21 for id., R. 444 (O.P.); R. 782. Handlers' gross avocado sales during these two years were $443,316.55. D. Ex. B, R. 124, 643, 688; D. Ex. C., R. 550, 643, 688.

Handler South Florida Growers, Inc., was incorporated in Florida on April 29, 1953 (R. 554), and marketed avocados in California during the 1954-1955, 1955-1956, 1956-1957 and 1957-1958 shipping seasons. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. During these years 34,905 bushels of avocados were shipped into California, of which 641 bushels, or 1.84 percent, were transshipped out of the State for sale in other markets

[4] The earlier 1955 shipments by a predecessor co-operative corporation, which is not a party to this action, as shown by handlers' Exhibit 21 for identification, are not relevant to any issue in the case. R. 443 (O.P.).

after failing to pass the 8 percent oil test. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. These transshipments resulted in a claimed reduction in gross income during these years of $1,587. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. This figure amounts to but an infinitesimal part of this handler's gross avocado sales during these four years of $3,793,919.75. D. Ex. A, R. 120, 643, 688; D. Ex. D, R. 551, 643, 688.

Of all avocados shipped into California by these handlers, over 96 percent passed the 8 percent oil standard and were freely marketed in California. Pl. Ex. 17, 19, 20, 21, all for id.; R. 438, 441, 442, 443 (O.P.); R. 782.

All of handlers' marketing operations in California occurred prior to January 5, 1959, when appellant Edmund G. Brown took office as Governor of California and appellant Stanley Mosk was sworn in as Attorney General, and prior to February 1, 1961, when appellant Charles Paul became Director of Agriculture. R. 778-779. No facts showing interference by any of these officers appear in the record. No threat of interference with the rights of handlers appears beyond that implied by the existence of the California statute and regulations. And, of course, any state court action by state officers against handlers would be subject to review in this Court of any federal questions involved.

"[F]ederal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm by the

challenged action." *Poe* v. *Ullman*, 367 U.S. 497, 504 (1960); see also *Stearns* v. *Wood*, 236 U.S. 75, 78 (1914). A plaintiff asking a federal court to disturb the delicate balance of federal-state relations by restraining state officers from performing their official duty must pass a "strict test" of injury. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593 (1946). To justify such interference, there must be proof that this is one of those "exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." *Douglas* v. *Jeannette*, 319 U.S. 157, 163 (1943).

On a record showing no injury of any consequence, the district court correctly held, as a matter of law, that handlers had failed to establish a case within the equity jurisdiction of the court. R. 781. But the district court erred in proceeding further to decide the constitutional issues on their merits. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935); *Douglas* v. *Jeannette*, 319 U.S. 157, 162-165 (1943). In doing so the court decided constitutional issues when it was unnecessary to do so, permitted constitutional questions to be raised by a litigant who has only a hypothetical interest in its outcome, and decided constitutional questions of major importance, which upon the facts in evidence, were not presented for decision. The district court thereby departed from the salutory judicial policy of strict necessity in disposing of constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-571 (1947); *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935).

B. The Issue of Equity Jurisdiction Was Open for Decision by the District Court.

The district court, although deciding that handlers' case lacked equity, proceeded to decide the constitutional question because in its view the remand from the previous appeal left it " . . . no discretion to decline equitable jurisdiction. . . ." 197 F. Supp. 780, 784. But the record shows that the issue of equity jurisdiction was open for decision by the district court.

State officers originally moved in the district court that handlers' complaint be dismissed on the ground, among others, that no case in equity had been established. R. 60, 98. After hearing, the district court dismissed on the ground that it had no jurisdiction to decide the case because of the absence of a justiciable case or controversy. R. 125. The memorandum decision of the trial court made it clear that its disposition of the case prevented it from considering whether equity jurisdiction existed: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." *Florida Lime Growers* v. *Jacobsen*, 169 F. Supp. 774, 776 (1958). On direct appeal to this Court, the issues were whether handlers' complaint established a case or controversy within the jurisdiction of the district court, and whether appellate jurisdiction existed in this Court to hear the direct appeal. Therefore, this Court in its previous decision in this case did not consider or decide all the questions which might arise in

the further progress of the litigation. It decided only that the district court had committed error in holding that handlers' complaint presented no justiciable case or controversy and reversed with the direction that "the cause is remanded to the district court for further proceedings not inconsistent with this opinion." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 86 (1960). The question decided, and laid to rest, was that on the basis of the allegations of the complaint, "there is an existing dispute between the parties as to prevent legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." 362 U.S. 73, 85-86. Therefore, the question whether handlers' case fell within the discretionary equity jurisdiction of the district court was not passed upon by either that court, or by this Court. This issue remained a part of the "existing dispute" between the parties which was still before the court below for resolution after remand.

C. The Evidenciary Rulings of the District Court May Not Be Considered on Appeal But in Any Event Are Correct.

The jurisdictional statement filed by state officers agrees to the correctness of the ruling of the district court excluding from evidence handlers' depositions of witnesses, Biggar, Harkness, Kendall, Piowaty and Wimbish, and excluding from evidence handlers' exhibits for identification 1 to 26. R. 782. Jurisdictional Statement, *Paul* v. *Florida Lime Growers,* Supreme Court of the United States, October Term, 1962, No.

49. Similarly, the questions presented in handlers' jurisdictional statement filed in the companion appeal do not fairly comprise the question of the evidenciary rulings of the trial court. Jurisdictional Statement, *Florida Lime Growers* v. *Paul,* Supreme Court of the United States, October Term, 1962, No. 45, pp. 4-5. Handlers, therefore, may not question on appeal the correctness of the evidenciary ruling of the district court. Rule 40(2), Revised Rules, Supreme Court of the United States; *General Talking Pictures* v. *Western Electric Co.,* 304 U.S. 175, 177-178 (1938); *Roth* v. *United States,* 354 U.S. 476, 490, fn. 27 (1957).

Instead, handlers argue that these depositions and attached exhibits were admitted into evidence. Handler's Brief In Opposition, October Term, 1962, No. 45, pp 4-6. The refutation of this contention requires a review of the proceedings below. Handlers at the trial attempted a *tour de force* in seeking both to prevent cross-examination of any of their officers, and to prevent consideration at the trial of state officers' objections to handlers' depositions of these officers and the accompanying exhibits. Cross-examination was prevented by simply failing to call any of handlers' officers or employees as witnesses. R. 558-624.

Handlers and state officers had stipulated in writing that handlers might take certain depositions in Florida and

> ". . . that said depositions when taken may be read and used in evidence . . . subject to the same

objections and exceptions as if the said witness were personally present on the stand. . . ." Stipulation of Counsel, dated Jan. 9, 1958, Attached to Transcript of Depositions, set forth in the original record herein.

In order to avoid the hearing of state officers' objections to the depositions, handlers made no offer to read the transcripts into evidence, but instead offered the lengthy depositions and attached 22 exhibits into evidence *en masse*. R. 576. The following proceedings then occurred:

Mr. Fourt, counsel for state officers: "We object, your Honor, and we respectfully ask permission and request they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay."

Judge Goodman: "We will mark—do you wish to have the depositions marked?"

Mr. Ferguson, counsel for handlers: "Yes, your Honor."

Judge Goodman: "We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them." R. 576.

Mr. Fourt: "Thank you very much."

Judge Halbert: "In other words, all objections will be reserved."

Judge Goodman: "All objections will be reserved." R. 576.

Subsequently, handlers had Exhibits 23, 24, 25 and 26 marked for identification. R. 576, 583. These exhibits, consisting of reprints from magazines and other research studies on avocados, were then offered in evidence, with the court reserving its ruling on their admissibility. R. 603.

At the conclusion of handlers' case, the state officers made inquiry as to whether handlers' Exhibits 1-26 for identification had been offered in evidence and received the reply of Judge Goodman: "They have been offered in evidence but we have reserved the ruling on them." R. 625. At the conclusion of the trial, state officers renewed their objections: "We would have testimony, then, your Honor, to produce if any of the matters in the depositions are to be admitted into the record, and any of those documents. We feel if is a material prejudice here, and we ask that the depositions be read, and we be allowed to enter our objections." R. 684. Judge Goodman then stated ". . . We have told you that your objections stand to every word that is in these depositions here . . ." (R. 684.) ". . . They are all in evidence subject to your objections and the Court will rule on them when it makes its rulings in the case. . . ." R. 685.

The district court having had the transcript of the oral testimony before it, confirmed in its memorandum opinion that it had "reserved its ruling" on the admissibility of handlers' depositions and exhibits. R. 758. 197 F. Supp. 780, 782. Their contents were ex-

amined "arguendo," (by way of argument only, 2 Bl. Comm. 238) to test the strength of handlers' constitutional attacks on the state statute. The memorandum opinion concluded with the direction that state officers prepare findings, a form of judgment ". . . and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum. . . ." 197 F. Supp. 780, 788. Pursuant to this direction, the district court entered its formal written order which recited that "The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;" and that "Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;" R. 782. This order further reserved to state officers "the right to introduce rebutting evidence at a further hearing should it be determined on appeal and remand that the plaintiffs' [handlers'] offer of proof should have ben admitted into evidence. R. 782.

As noted, the district court in its memorandum opinion stated that it was not ruling "on the objections made by defendants [state officers] to plaintiffs' [handlers'] evidence *on which the Court has reserved its ruling* . . . We will assume, arguendo, that the exhibits and depositions offered by plaintiffs are all admissible." (emphasis added). 197 F. Supp. 780, 782.

From this statement, handlers argue that the district court did not rule on the objections of state officers which were therefore "in effect overruled." Handlers' Brief in Opposition, *Florida Lime* v. *Paul*, October Term, 1962, No. 45, pp. 5-6. This argument fails for two reasons: First, the relevant question is whether *handlers'* depositions and attached exhibits were admitted into evidence. Clearly, they were not admitted into evidence since the memorandum opinion shows that the district court "reserved its ruling" on the admissibility of handlers' evidence (197 F. Supp. 780, 782), and its formal order explicitly excluded these depositions and exhibits from evidence. R. 782. If these evidenciary rulings were correct, then it is irrelevant whether the district court agreed or disagreed with the legal arguments underlying state officers' objections. The memorandum opinion clearly provided that formal orders and judgments conforming to the opinion were to be prepared for subsequent entry by the trial court. 197 F. Supp. 780, 788. And it is presumed that the formal order holding handlers' depositions and exhibits inadmissible, conformed to the earlier written memorandum opinion. Secondly, the memorandum opinion cannot be used to impeach and annul the formal ruling on the admissibility of the evidence, the findings, or the judgment. See *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395 (1948), in which the Court held that a memorandum opinion discussing a portion of the evidence and giving the district court's reasoning did not constitute

the formal findings required under former Federal Equity Rule 70½, now Rule 52(a), Federal Rules of Civil Procedure. See also Rule 21, Rules for the United States District Court, Northern District of California.* It is the principle of law as applied to the facts which is reviewed on appeal, not the reasons given by the lower court for its decision. *Parks* v. *Turner*, 12 How. 39, 47 (1851).

Handlers also suggested in their Brief In Opposition filed in the companion appeal, October Term, 1962, No. 45, page 5, that these depositions and attached exhibits became evidence in the case because state officers made reference to them in the original motions to dismiss made in the district court. R. 61, 99; *Florida Lime Growers* v. *Jacobsen*, 169 F. Supp. 774, 776, reversed 362 U.S. 73. Such reference in the moving papers was proper since the district court may inquire by affidavit, deposition and otherwise, into the facts as they exist when the question of its jurisdiction is raised. *Land* v. *Dollar*, 330 U.S. 731, 734, fn. 4 (1947). But state officers' concessions made in their motions to dismiss were made only for the purpose of questioning the equity jurisdiction of the district court, and were not intended to be a waiver on the merits of the questions of fact placed in issue by state officers' answers. R. 527, 785. The rule in analogous cases is that such concessions are provisional only.

* Rule 21, "Where written order of judgment is to be prepared by counsel and settled, no memorandum of decision or opinion or any minutes made by the clerk of the court's decision shall constitute entry of judgment under said [Federal] Rules [of Civil Procedure]."

M. Snower & Co. v. *United States*, 140 F. 2d 367, 370 (1944) (motion for judgment on the pleadings); *Begnaud* v. *White*, 170 F. 2d 323, 327 (1948) (motion for summary judgment); *Prepo Corporation* v. *Pressure Can Corporation*, 234 F. 2d 700, 703, cert. denied, 352 U.S. 892 (1956) (motion for summary judgment). In short, handlers cite no authority, nor has any precedent been found, to support the assertion that state officers waived their evidenciary objections by the filing of a motion to dismiss.

In any event, the district court correctly decided these evidenciary questions against handlers who carry the burden of showing that these rulings were prejudicially erroneous. *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943). At the trial, counsel for handlers suggested that consideration of state officers' evidenciary objections be deferred for post trial determination saying: "My suggestion is that questions of relevancy and materiality of this [deposition] evidence and the Exhibits 1 to 22, inclusive, can better be considered by the Court in the arguments of the case, and if this includes questions of admissibility they can be argued to the Court . . . I am not asking counsel [for state officers] to waive any objections." R. 646. Handlers thereby agreed to the reservation by the district court of "all objections" by state officers, including objections of admissibility, to the depositions and exhibits offered in evidence by handlers. R. 576, 603, 625, 646, 682, 683, 685.

State officers thereafter made specific objections to this proffer of evidence (R. 700-729) which are sum-

marized in the Appendix at pages 27 to 46. State officers in particular pointed out that handlers had offered in evidence the depositions of five witnesses with 22 attached exhibits as the principal part of their case without establishing the foundation required by Rule 26(d), Federal Rules of Civil Procedure.[6] R. 700-702.

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These depositions and exhibits were offered as affirmative evidence and not for the purpose of impeachment.

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[6] Rule 26(d) provides:

"(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

"(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

R. 576. Since the deponents were either officers of handlers (Kendall and Piowaty), or persons in the employ of neither party (Biggar, Harkness, Wimbish), their testimony could not come in under Rule 26(d)(2).

Handlers failed to lay the requisite foundation for use of the depositions under Rule 26(d)(3). No showing was made that either (1) the witnesses were dead; (2) that the witnesses were at a greater distance than 100 miles from Sacramento, California, or were out of the United States; (3) the witnesses were unavailable because of infirmity or imprisonment; (4) that the witnesses' attendance could not have been secured by subpoena, or (5) that exceptional circumstances existed which excused the presentation of the testimony of these witnesses orally in open court.[7] In fact, handlers didn't even ask the court to make such findings during the trial and made no motion for new trial after judgment. Under these facts, the district court did not abuse its discretion in excluding these five depositions and 22 attached exhibits from evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below be modified to provide that the action be dismissed for failure of handlers

[7] Handler corporations presumably had it within their means to produce their own chief officers, i.e. Kendall, President of South Florida Growers Association, Inc. (R. 251 (O.P.)); Piowaty, Secretary, Florida Lime and Avocado Growers, Inc. (R. 314 (O.P.)). *Vercilstad v. Flynn*, 9 CA, 230 F. 2d 695, 702, cert. denied, 352 U.S. 827 (1956).

to establish a case within the equity jurisdiction of the district court, and that, as modified, the judgment be affirmed. See *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97.

Respectfully submitted,

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APPENDIX

I. The Applicable Portions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as Amended 68 Stat. 906, 7 U.S.C. 608(c), et Seq., Provide:

608c. Orders regulating handling of commodity.

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable.

Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof . . . fruits . . . .

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is

known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * *

(10) Manner of regulation and applicability.

No order shall be issued under this section unless it regulates the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in a marketing agreement upon which a hearing has been held. . . .

(11) . . .

(B) Except in the case of milk and its products orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy. . . .

§610(i) Cooperation with State authorities, importing information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f—612, 613, 614—619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: . . .

II. State Officers' Objections to Handlers' Proffer of Depositions and Attached Exhibits.

A. THE DISTRICT COURT CORRECTLY EXCLUDED HANDLERS' EXHIBITS 17 AND 21 FOR IDENTIFICATION FROM EVIDENCE.

Handlers' Exhibits 17 and 21 for identification consist of two typewritten documents headed "Avocado Shipments Barred from Sale in California." R. 438, 443 (O.P.); R. 576, 782. Exhibit 17 for identification summarizes seven transactions, each purporting to reflect the shipping of a lot of avocados to California, by handler South Florida Growers Association, Inc., the rejection of the lot in California upon test of oil content, their reshipment and sale outside the State of California, and the resulting lessening of expected gross returns. R. 438 (O.P.). Exhibit 21 for identifica-

tion similarly reflects five shipments of avocados to California by handler Florida Lime and Avocado Growers, Inc. R. 443 (O.P.). State officers objected to their admission into evidence on the grounds (1) that the documents constituted inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) were irrelevant. R. 720-721.

The statements in these documents, being in writing, were not made in the presence of the district court, nor were they even made in the presence of the officer taking the depositions. R. 263-265, 318-319 (O.P.). Since these documents consist of extrajudicial declarations offered in evidence to prove the truth of the matter asserted, they constitute inadmissible hearsay. *Donnelly* v. *United States*, 228 U.S. 243, 273 (1913). The vice of the hearsay evidence exemplified by handlers' exhibits is that the declarations are made without the sanction of an oath, without responsibility on the part of the declarant for error or falsification, and without opportunity for the court or the parties to test the accuracy and veracity of the declarant by cross-examination. Id. 228 U.S. 243, 273.

These exhibits are not true summaries of records of handlers' business operations, but rather are carefully selected excerpts which have been drawn together for purposes of litigation. Since the handlers' business is the marketing of fruits and vegetables, not litigation, the documents in question were not made in the regular course of their business. Since they were not made in the regular course of business, these

documents do not come within the business records exception to the hearsay rule set forth in 28 U.S.C. 1732. *Palmer* v. *Hoffman,* 318 U.S. 109 (1943).

It is true that handlers had with them at the time the depositions were taken, copies of bills of lading issued by a common carrier, a statement of account rendered by the California consignee, and a copy of a certificate of inspection from the federal-state inspection service. R. 263-265, 318-319 (O.P.). However, none of these documents, which were not made by handlers, were authenticated, nor were they even marked for identification. Their contents were inadmissible hearsay since declarants were not under oath nor available for cross-examination. Therefore, a summary of their hearsay statements in handlers' Exhibits 17 and 21 for identification obviously constitutes inadmissible hearsay. The district court, therefore, was plainly correct in excluding these exhibits from evidence.

B. HANDLERS' EXHIBIT 16 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

1. Handlers' Exhibit 16 for identification consists of numerous pages of avocado oil test determinations made at the University of Florida Sub-Tropical Experiment Station, Homestead, Florida. R. 389 (O.P.); R. 576, 782. Tests were made by a Mrs. McKee and a Mrs. Kelp. R. 228-229 (O.P.). The witness Harkness was present during only a few of these tests. R. 229 (O.P.). State officers objected to the introduction of this exhibit into evidence on the grounds (1) that

there had been no foundation laid showing the accuracy of the oil testing method used, and (2) that the exhibit was irrelevant to the issues in this case since no foundation had been laid showing that the avocados tested were mature edible avocados, or that they met the federal weight-size requirements. R. 702-712.

2. Handlers' witness Roy W. Harkness testified that a series of oil content analyses were made on Florida avocados at handlers' request. R. 219 (O.P.). These analyses were made out of court and without notice to state officers. The vice of this class of experimental evidence is that its use allows a party to manufacture evidence in its own behalf. Thus, for example, a slight change in the conditions under which the experiment is made, or in the equipment used, will so distort the result as to wholly destroy its value as evidence.

Handlers' Exhibit 16 for identification consisted of oil tests made by Mr. Harkness on Florida orchard-run avocados from July 6, 1953, through January 16, 1957. See testing dates, Handlers' Ex. 16 for ident.; R. 389-437 (O.P.). On direct examination, Mr. Harkness testified:

> "Q. What method did you use to test the oil content?
>
> "A. We used exactly the method used in California, with the hallowax oil and the shaker bomb.
>
> "Q. What equipment did you use?
>
> "A. We used the shaker bomb, and we used the refractometer for getting the refractive index,

and also miscellaneous laboratory equipment." R. 210-211 (O.P.).

However, on cross-examination, Mr. Harkness admitted that a method *other* than the prescribed California oil test had been used:

"Q. Doctor, in your oil tests, which appear to have been made from 1953 to date, what type of oil tests did you utilize?

"A. It was essentially the method used in California. *We modified the method slightly, so as to avoid using the shaker machine which they use.*" (Emphasis added.) R. 243 (O.P.).

Handlers do not challenge the state-prescribed avocado oil testing method used in California. R. 630. Indeed, handlers cannot, because the state ball-grinder oil test method, prescribed by California regulation, has been standardized against the scientifically accepted ether oil extraction method and its reliability thus assured. Bulletin of the California Department of Agriculture, Volume XLIV, No. 1, page 1, and 3 California Administrative Code, Section 1397.5. R. 90, 93. Photographs of the state-prescribed ball-grinder, and of the Waring Blendor, used by handlers' witness Mr. Harkness, are shown in the record on pages 749-750.

No foundation was laid showing that the "modified" oil test method used by handlers in which a household mixer is substituted for the California ball-

grinder equipment produced an accurate measurement of oil test.[1]

3. Compliance with federal avocado size and weight regulations constitutes a condition precedent to the handling for sale of avocados grown in South Florida. 7 C.F.R. 915.61; 197 F. Supp. 780, 783. Commingled in the avocados tested in handlers' Exhibit 16 for identification were: (1) those picked in test orchards, and (2) avocados picked in commercial orchards. R 220-226. Since the fruit tested came direct from the orchard and not from handlers' packing houses, and since some of the fruit did not come from commercial orchards, the fruit tested was not representative of fruit which had been graded, sized and inspected at the packing house which handlers would actually ship to California. Low oil tests could easily be secured by simply supplying Mr. Harkness with small fruit which handlers could not have legally marketed under the federal weight and size marketing regulations, e.g., 19 F.R. 4404.

Further, the many oil tests made from July 6, 1953, through July 19, 1954, Pl. Ex. 16 for ident., R. 389

[1] State officers offered in the trial court to prove that the handlers' oil test method was inaccurate in that it (1) failed to recover substantial quantities of the available oil in the avocado fruit tested, and (2) produced materially erratic oil test results. R. 707-712. The trial court did not accept this tender of rebuttal evidence since handlers' depositions and attached exhibits were excluded from evidence. R. 782. However, the right to adduce this proof at a further hearing was reserved to state officers by the district court in the event that it was held on appeal that handlers' depositions and attached exhibits were erroneously excluded from evidence. R. 782; 197 F. Supp. 780, 782 fn. 2.

(O.P.); R. 576, 782, were made prior to the first federal size and weight shipping restriction issued effective July 26, 1954 (19 F.R. 4404) and are, therefore, irrelevant to any issue in the case. With respect to the avocados tested after July 19, 1954, only average weights for groups of five to nine are generally given, e.g., R. Pl. Ex. 16 for id., R. 413-416 (O.P.); R. 576, 782. (O.P.). Neither are the diameters of any individual fruit given. Thus it is impossible to ascertain from handlers' Exhibit 16 for identification whether any given fruit would have met the federal shipping restrictions. Similarly, there is no showing that the fruit tested met the federal requirement ". . . that the avocado has reached a state of growth which will insure a proper completion of the ripening process." R. 39, 19 F.R. 5440; 19 F.R. 6990; 19 F.R. 7263; 7 C.F.R. 51.3058. This defect is made apparent by an examination of page 28 of Exhibit 16 for identification. R. 427 (O.P.); R. 576, 782. The witness Harkness was asked: ". . . whether any of that fruit [listed on page 28] was covered by a Federal-State Inspection Certificate?"

"A. No, not when it was brought to us, that is, insofar as I know.

"Q. Then so far as you know it had never been inspected?

"A. That is right." R. 227 (O.P.).

Handlers' Exhibit 16 for identification is therefore irrelevant to the issues of the case since no showing was made that the avocados involved could have been

legally shipped from South Florida under federal law.

Plainly state officers' objections that the proffered document constituted inadmissible hearsay and is irrelevant to any issue in the case are well taken, and the district court properly excluded handlers' Exhibit 16 for identification from evidence.

C. HANDLERS' EXHIBITS 12 AND 13 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 12 and 13 for identification consist of excerpts from handlers' Exhibit 16 for identification, and a partial extract from unidentified regulations issued by the Secretary of Agriculture. R. 164, 165, 209-213 (O.P.); R. 576, 782 (O.P.). Handlers' witness Biggar, Manager of the Avocado Administrative Committee, as a personal favor to Harold E. Kendall and Fred Piowaty, officers of handler corporations, visited the University of Florida Sub-Tropical Experiment Station, Homestead, Florida, and copied onto Exhibits 12 and 13 for identification portions of the records he found there. R. 164-165 (O.P.). Kendall and Piowaty were members of the Avocado Administrative Committee. R. 191-192 (O.P.). The witness Biggar, at the time the exhibit was prepared, knew of the pendency of the lawsuit and that the exhibit could be used as an exhibit in said action by handlers. R. 172-173 (O.P.). Biggar admitted that he had no personal knowledge of the information he copied onto Exhibits 12 and 13 for identification. R. 171-172 (O.P.).

State officers objected to the introduction into evidence of handlers' Exhibits 12 and 13 for identification on the grounds (1) that the information pertaining to oil tests is derived from Exhibit 16 for identification, said Exhibit 16 being inadmissible hearsay, (2) that those portions of Exhibits 12 and 13 for identification which identifies the person making the request for oil content testing, and identifying the owner of the avocado grove concerned, constitutes inadmissible hearsay, and (3) that the lower portion of the exhibit constitutes inadmissible secondary evidence of the contents of the unidentified federal regulations. R. 717-719.

Handlers' witness Harold E. Kendall, on cross-examination, admitted that he had never personally delivered any of the avocados listed on Exhibit 13 for identification to the Sub-Tropical Experiment Station. R. 275-276 (O.P.). His personal involvement was the giving of instructions to handler South Florida Growers', Inc., field superintendent, that sample avocados be picked and delivered to the experiment station. R. 276 (O.P.). The testimony of Kendall is the only testimony connecting handler South Florida Growers, Inc., with Exhibit 13 for identification, other than the hearsay statements of Biggar. R. 164. Since Kendall's testimony in this regard is not based on personal knowledge, he is not qualified as a witness to testify thereon. Exhibit 13 for identification therefore constitutes inadmissible hearsay since its contents are

identified only through the hearsay testimony of Kendall and Biggar.

Handlers' witness Fred Piowaty on cross-examination similarly admitted that he had never personally delivered any of the avocados listed on Exhibit 12 to the Sub-Tropical Experiment Station. R. 326-327 (O.P.). Nor had he personally picked any of the fruit. R. 327 (O.P.). Thus, Piowaty had no personal knowledge of the facts recited in Exhibit 12, and his testimony constitutes inadmissible hearsay. Since Exhibit 12 for identification rests on the hearsay testimony of Biggar and Piowaty, it too constitutes inadmissible hearsay.

It is plain that Exhibits 12 and 13 for identification are extrajudicial writings which are offered to prove the truth of the matters asserted. As such, they constitute inadmissible hearsay. The testimony of Biggar, the person preparing the document, shows that it was not prepared in the course of the business of the Avocado Administrative Committee, but as a personal favor to handlers. R. 170 (O.P.). The title and form of these documents show that they were prepared for litigation and not in the course of business. Pl. Ex. 12 and 13 for Id., R. 371, 375 (O.P.); R. 576, 782. They are therefore not admissible in evidence as business records. *Palmer* v. *Hoffman*, 318 U.S. 109, 114 (1943).

These portions of Exhibits 12 and 13 for identification which purport to identify the person making the request for oil content testing, and which purport

to identify the grove where the avocados were picked, constitute inadmissible hearsay. Biggar was not the declarant since he merely copied this information from records he found in the office of Harkness. R. 164 (O.P.). He had no personal knowledge of these facts. R. 170-172 (O.P.). Similarly, Harkness was not the declarant since his knowledge was derived from the hearsay statements of the persons bringing fruit from correncial groves to him for testing. R. 220-224 (O.P.). Objection was also made to those portions of Exhibits 12 and 13 for identification which purport to be summaries of federal regulations. R. 717-718. These federal regulations are not identified and not authenticated, and no foundation was laid showing the accuracy of these summaries. These portions of the exhibit, therefore, also constitute inadmissible hearsay.

D. HANDLERS' EXHIBITS 4, 5, 7, 8, 10 AND 11 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

State officers objected to the introduction into evidence of handlers' Exhibits 4, 5, 7, 8, 10 and 11 for identification on the grounds that such exhibits constitute (1) inadmissible secondary evidence of the contents of other written documents not produced in court, (2) are not the best evidence of the contents of such other documents, (3) are inadmissible summaries, and (4) are inadmissible hearsay. R. 713-717.

Handlers' witness Biggar was the only one who testified regarding out-of-court preparation of these documents. Since they are offered in evidence by

handlers to prove the truth of the matter asserted, they constitute hearsay. Analysis shows them to constitute inadmissible hearsay. Further, the exhibits purport to show the volume of avocado shipments from both California and Florida for the years 1955, 1956 and 1957. The relief sought by handlers is a prospective-looking injunction and the relevance of this information dealing with past years is not articulated by handlers.

Biggar testified that he had prepared Exhibit 4 for identification from information set forth in inspection certificates supplied him by a third person, supposedly the federal-state inspection service. R. 168-169 (O.P.). The declarant therefore was not Biggar but the person who made the certificates. These certificates were never produced by handlers for state officers' inspection. Neither was a foundation laid showing their authenticity or mode of preparation, the witness having no personal knowledge of these facts. R. 169 (O.P.). State officers have never been given the opportunity to cross-examine the declarants of these extrajudicial hearsay statements set forth in Exhibit 4 for identification. This exhibit was therefore properly excluded from evidence.

The information set forth in handlers' Exhibit 5 for identification as prepared by Biggar, came from a letter never produced by handlers, from the Federal Department of Agriculture and from estimates supplied by Calavo Growers of California, a private marketing co-operative. R. 153-154 (O.P.). As in the case

of Exhibit 4 for identification, state officers have never been given the opportunity of cross-examining the declarants of these extrajudicial hearsay statements. This exhibit, therefore, constitutes an inadmissible hearsay summary of the contents of other hearsay documents.

Exhibit 7 for identification purports to list by variety and by week for the period June 1, 1956 to March 31, 1957, the quantities of avocados shipped from South Florida. R. 361 (O.P.); R. 576, 782 (O.P.). But the witness Biggar was not the declarant since he had no personal knowledge of the origin of these figures. R. 169 (O.P.). For the figures shown on lines 1 to 13 of the exhibit, the witness relied on certificates of inspection furnished him by the federal-state inspection service, and for the figures shown on lines 13 to 40, he relied upon reports supplied to him by Florida shippers of the fruit. R. 169 (O.P.). Neither the certificates of inspection, nor the reports of the private shippers, have been made available to state officers. Neither have the faceless declarants who made these extrajudicial reports been made available for cross-examination. Plainly, therefore, Exhibit 7 for identification was properly excluded from evidence as inadmissible hearsay.

Exhibit 8 for identification was prepared by the witness Biggar and purports to show California, Cuba and Florida shipments of avocados by week from April 2, 1955, through March 31, 1957. R. 169 (O.P.). The declarant was not Biggar, who had no personal

knowledge of the facts reflected in this document, but who instead relied on estimates supplied by a California avocado marketing corporation, from certificates of inspection made by the federal-state inspection service and by "unpublished U.S.D.A. records." Pl. Ex. 8 for Id., R. 363 (O.P.); R. 576, 782; R. 169 (O.P.); R. 674. This exhibit, therefore, also constitutes inadmissible hearsay matter, and was properly excluded from evidence.

Handlers' Exhibits 10 and 11 for identification purport to list avocado shipments from South Florida by week for the period April 1, 1957, through January 11, 1958. Pl. Ex. 11 and 12 for Id., R. 370, 371 (O.P.); R. 576, 782. These documents were made by handlers' witness Biggar from information set forth in certificates of inspection furnished to him by the federal-state inspection service. R. 161-163 (O.P.). The declarant of these extrajudicial statements was not Biggar, who had no first-hand knowledge of the facts recited, but rather were the unidentified persons who made out the original certificates. Exhibits 10 and 11 for identification, therefore, constitute inadmissible hearsay matters and were correctly excluded from evidence.

But, claims handlers, Exhibits 4, 5, 7, 8, 10 and 11 for identification come within the official records exception to the hearsay evidence rule under 28 U.S.C. 1733. This statute provides:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act,

transaction or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

However, the Avocado Administrative Committee is not a federal agency within this statute. The committee consists of nine members selected by the Secretary of Agriculture. 7 C.F.R. 915.20. Five are producers of Florida avocados and four are handlers of Florida avocados. 7 C.F.R. 915.20. Their primary function is to recommend proposed administrative regulations to the federal Secretary of Agriculture. 7 C.F.R. 915.50. The committee represents and acts on behalf of the Florida avocado industry, not the federal government. R. 599-600. Its records therefore are not official records within 28 U.S.C. 1733.

In addition, the presumption of impartiality attendant to official records is lacking here. The summaries were prepared by the witness Biggar, a pleasure employee of the administrative committee. R. 192 (O.P.). The committee itself is composed of growers and handlers of Florida avocados. 7 C.F.R. 915.20. Among these members were Harold Kendall and Fred Piowaty. R. 191-192 (O.P.). These men are officers in the plaintiff corporations in this case and testified for handlers. R. 251, 314 (O.P.). Under these circumstances the bias of the witness Biggar casts

shadows on the reliability of the exhibits prepared by him. These exhibits, therefore, cannot reasonably have the indicia of reliability and impartiality required under 28 U.S.C. 1733.

E. HANDLERS' EXHIBITS 6, 9 AND 14 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 6, 9 and 14 for identification consist of summaries of federal regulations issued successively during the 1956-1957, 1957-1958 Florida avocado shipping seasons. R. 359, 364, 379 (O.P.); R. 576, 782 (O.P.). These summaries were prepared by the witness David M. Biggar, a pleasure employee of the Avocado Administrative Committee. R. 192 (O.P.).

State officers objected to the admission into evidence of the exhibits on the grounds (1) the exhibits constitute inadmissible secondary evidence of the contents of the original regulations, and are not the best of evidence of such contents, (2) constitute inadmissible hearsay, (3) the exhibits do not constitute a written verbatim copy of the original regulations, and (4) there has been no authentication of the original regulations. R. 717.

Presumably, the original federal regulations, or authenticated copies, are available to handlers. Since production is thus feasible, it should be required since every word and every part in the whole should be compared before a court determines the total sense and effect that should be given it.

Handlers, of course, may make appropriate reference to the regulations of the Secretary of Agriculture which are published in the Federal Register. This circumstance renders formal proof of the contents of the regulations unnecessary. This taking of judicial notice re-enforces state officers' argument that handlers' Exhibits 6, 9 and 14 for identification constitute inadmissible hearsay summaries of the regulations in question, and should not be admitted into evidence, since alternative proof is available.

F. HANDLERS' EXHIBIT 15 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibit 15 for identification consists of bulletins issued by the Avocado Administrative Committee from May 15, 1957 to October 9, 1957. The bulletins relate recommendations made by the committee to the Federal Secretary of Agriculture. As recommendations, the bulletins are irrelevant. If tendered to prove the contents of the actual regulations, the exhibits are inadmissible secondary evidence since the regulations themselves are the best evidence of their contents. The exhibits are similarly inadmissible if considered as summaries of federal regulations (otherwise not identified) since they would then constitute inadmissible secondary evidence of the contents of the regulations. R. 719.

G. HANDLERS' EXHIBIT 22 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibit 22 for identification is an unauthenticated document with the heading "Los Angeles

County Agricultural Commissioner." State officers object to the introduction of the exhibit in evidence on the grounds that (1) its authenticity has not been shown, and (2) the document constitutes inadmissible hearsay. R. 721-722.

The only testimony regarding Exhibit 22 for identification is that of witness Piowaty, Secretary of handler Florida Lime and Avocado Growers, Inc. R. 314 (O.P.). Piowaty testified (1) that the exhibit had been procured by his "consignee in Los Angeles," and (2) that it contained a memorandum of oil tests. R. 320 (O.P.). No showing is made either establishing the authenticity of the document or identifying who made the entries thereon. Without such foundation, Exhibit 22 for identification is inadmissible hearsay. Similarly, the witness is not the declarant since he had first-hand knowledge of the transactions reflected in the exhibit. The witness is therefore not privileged to testify regarding the transaction, and his statements constitute inadmissible hearsay.

H. HANDLERS' EXHIBITS 23, 24, 25 AND 26 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 23, 24, 25 and 26 for identification consist of a number of treatises and one chart. R. 446-486 (O.P.).

Exhibit 23 for identification consists of:

(1) Typewritten pages entitled, "General Information on Avocado Research."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 67, 1954, entitled,

"The Relation of Maturity to Quality in Florida Avocados."

(3) A collection of writings headed, "Evidence Presented at Hearings Before Secretary of Agriculture," March 8, 1954, by Paul L. Harding. R. R. 446-467 (O.P.).

Exhibit 24 for identification consists of:

(1) Typewritten pages entitled, "General Information on Avocado Research, 1954-1955."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 68, 1955, entitled, "Relation of Maturity of Florida Avocados to Physical Characters." R. 472-477 (O.P.).

Exhibit 25 for identification consists of:

(1) Typewritten pages entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. LXX, 1957, entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(3) Chart headed, "Some Physical and Chemical Changes in the Principal Varieties of Florida Avocados Picked Above and Below the Regulated Minimum Weight, 1955-1956." R. 478-486 (O.P.).

Exhibit 26 for identification consists of typewritten pages entitled, "Résumé of Progress of Studies on Florida Maturity," by Thurman T. Hatton, Jr. R. 486 (O.P.).

At the trial handlers objected to the introduction into evidence of these exhibits on the grounds that

they constituted (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) are irrelevant. R. 722. These exhibits were identified as "part of the records of the United States Department of Agriculture." R. 583. But no foundation was laid showing the source or accuracy of the opinions expressed in these obviously *ex parte* investigations. State officers could not cross-examine these exhibits, nor could they cross-examine the witness Harding because he was not the declarant, there being no showing that he possessed firsthand knowledge of the facts. As the product of research, they are controversial and do not reflect the day-to-day operations of the federal government. These exhibits, therefore, were correctly excluded from evidence. *United States* v. *International Harvester Co.*, 274 U.S. 693, 703 (1927); *Hegler* v. *Faulkner*, 153 U.S. 109, 117-118 (1894). Further, the research work on avocados shown in this material is not relevant to any of the issues in this case since state officers do not attack the validity of the federal avocado regulations.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

Appeal From the United States District Court for the Northern District of California. Northern Division

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

Appeal From the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Northern Division, is reported in 197 F. Supp. 780.

JURISDICTION

Handlers'[1] action was brought under 28 U.S.C. 1331 and 1337 to enjoin state officers[2] from enforcing California Agricultural Code, Section 792, as being unconstitutional and in conflict with an act of Congress regulating commerce. R. 1-42. Final judgment dismissing handlers' action on the merits was entered September 22, 1961. R. 783. Handlers' notice of direct appeal was timely filed in the district court on October 10, 1961 (R. 78), and probable appellate jurisdiction of the appeal was noted by the Court on January 15, 1962. 368 U.S. 964. The Honorable Homer T. Bone, United States Circuit Judge, and Louis E. Goodman and Sherrill Halbert, United States District Judges, heard the evidence presented at the trial February 7 and 8, 1961, and signed the memorandum opinion of the district court, filed July 12, 1961, which directed entry of judgment for state officers who were to prepare proposed findings, judgment, and any necessary orders. R. 557-685, 757-69. Judge Louis E. Goodman died on September 25, 1961. R. 784. Therefore, only Judge Bone and Judge Halbert signed the Findings of Fact and Conclusions of Law filed September 20, 1961 (R. 778-81), the order ruling on the evidenciary objections which were reserved by state officers, the order on substitution of party defendants filed September

[1] Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc. hereafter referred to as "handlers."

[2] Charles Paul, Director of Agriculture, Edmund G. Brown, Governor, and Stanley Mosk, Attorney General, hereafter referred to as "state officers."

21, 1961 (R. 782-83), and the judgment entered September 22, 1961. R. 783-84. State officers in their motion to dismiss the appeal, expressed doubt that handlers' application for injunction had been both "heard *and determined*" by a district court of three judges under 28 U.S.C. 1253, 2281. (Emphasis added.) Since the Court has noted probable jurisdiction of the appeal (368 U.S. 964), state officers assume that the Court has initially decided that the application for injunction was "determined" by the memorandum opinion signed by three judges, even though only two judges participated in the settlement of the findings which followed the tenor of the memorandum opinion. R. 757-69, 778-81. Compare *Ayrshire Corp.* v. *United States*, 331 U.S. 132, and *Cumberland Tel. Co.* v. *Pub. Serv. Commission*, 260 U.S. 212 with *Dohany* v. *Rogers*, 281 U.S. 362, 369-70 (1930). The Court, presumably, therefore, has appellate jurisdiction of the appeal under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Do the self-help avocado size and weight restrictions on the handling of avocados grown in south Florida, initiated by Florida avocado growers and handlers and issued by the Secretary of Agriculture, invalidate the California Avocado Inspection Law?

2. Is California Avocado Inspection Law in conflict with, or pre-empted by, Federal Marketing Agreement Act of 1937?

3. Is the California Avocado Inspection Law, which requires that avocados contain 8 percent oil, unconstitutional under the Commerce Clause or the Equal Protection Clause as applied to avocados grown in Florida and marketed in California?

STATUTES INVOLVED

California Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.
>
> "'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.
>
> "All avocados at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, et seq. are set forth in the Appendix.

STATEMENT

1. Summary of the Evidence.

Handlers are Florida corporations which market avocados. R. 554, 689; D. Ex. A, R. 123-125, 643, 688, 782; D. Ex. B, R. 120-122, 643, 688, 782. Their

complaint sought injunction restraining state officers from enforcing California Agricultural Code, Section 792, on the ground of its invalidity as applied to handlers' avocados under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, and as unconstitutional under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment of the Constitution. R. 1-42.

Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.
>
> "'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.
>
> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

This 8 percent oil content requirement was enacted by the California Legislature in 1925. Calif. Stats. 1925, Ch. 350, pp. 625, 633. The purpose of the law is to prevent the sale to consumers of immature avocados. R. 628. This inspection law is applied equally to both California and Florida avocados. R. 632. Avocados originating in Florida are inspected at the California destination point of the truck or

railroad car. R. 630. Shipments normally contain sized boxes of avocados, i.e., each size is packed in its own container. R. 633. Avocados that fail to meet the 8 percent oil content standard are generally discovered at the beginning of each variety's harvesting season, and such immature avocados are usually found in the smaller sizes of fruit. R. 633, 642. The handler, or other person in possession of the lot, is given an opportunity to bring the lot into compliance by removing the immature fruit. R. 633. These immature avocados may then be reshipped out of the State. R. 633. Handlers expressly conceded that the state-prescribed oil test is accurate (R. 630) and that there is no dishonesty in the enforcement of the state act. R. 672.

On the basis of the testimony and exhibits admitted into evidence, the three-judge district court entered detailed findings of fact. These findings were that avocados are harvested for commercial marketing in a hard inedible state. R. 591-92, 628, 664, 779; 197 F. Supp. 780, 782. After purchase by the consumer, they are allowed to soften and ripen. R. 628, 779. If the avocado is immature when picked, it will shrivel, become rubbery in texture, bitter in taste and useless as food. R. 592, 628, 665, 779. On the other hand, if picked when mature, the avocado softens into palatable, edible fruit. R. 592, 648, 779.

However, there is a temptation for growers to harvest their avocados early in the season when the fruit is in short supply and the market price is correspond-

ingly high, even though such avocados may be in an immature state. R. 618-19, 628, 665-66, 779; 19 F.R. 2419. But because avocados are harvested and marketed in a hard state, consumers and retail grocers cannot determine whether the avocados offered for sale are mature enough to soften into palatable, edible fruit. R. 628, 779.

Other than water, oil is the chief constituent of avocados. R. 608, 648, 779. This oil content increases along with palatability, as the fruit grows in size. R. 629, 633, 779. Because of this close relationship between oil content and the maturation of the fruit, oil content has been found to be the best available index of maturity of the avocado. R. 628-29, 648, 666, 779.

Avocados grown in south Florida are grouped into three classifications: (1) varieties which trace their origin to parent trees in Guatemala, (2) varieties which are hybrids developed from crossing strains from parent trees in the West Indies with strains from parent trees in Guatemala, and (3) varieties tracing their origin to parent trees in the West Indies. R. 588, 779. The hybrid and Guatemalan varieties in the 1959-1960 shipping season (March 31, 1959- March 31, 1960) constituted more than 88 percent of total south Florida avocado shipments and are of increasing commercial importance. D. Ex. E, R. 488-92, 643-44, 780, 782. These hybrid and Guatemalan varieties attain oil content as high as 20 percent while in prime marketing condition. R. 587. These major commercial

varieties of avocados grown in Florida have been marketed in California in the past. R. 678.

The West Indian varieties of Florida avocados generally do not attain 8 percent oil content. R. 590, 780. But the West Indian varieties have such poor shipping qualities and short retail grocery store "shelf-life" that it is not commercially feasible to transport them across the continent for marketing in California, without regard to the State's 8 percent oil content statute. R. 604-05, 666-67, 676-77, 780. These West Indian varieties are of declining commercial importance having dropped to less than 12 percent of total south Florida shipments in the 1959-1960 shipping season. D. Ex. E, R. 48-492, 780, 782.

The district court found that the California 8 percent oil standard was reasonable as applied to the hybrid and Guatemalan avocado varieties. R. 780. The applicability of the state statute to the West Indian varieties is hypothetical because these latter varieties have such poor shipping qualities and such a short "shelf-life" in the retail grocery store that their transportation from Florida to California for marketing would not be commercially feasible. R. 667, 676, 780; 197 F. Supp. 780, 786.

2. Proceedings in the Trial Court.

No officer or employee of either handler testified at the trial held February 7 and 8, 1961. R. 557-685. Handlers' entire case consisted of the testimony of a single witness, Paul Louis Harding, Supervisory

Plant Physiologist, United States Department of Agriculture. R. 558-59. His testimony related to the palatability and maturation of Florida avocados. R. 558-622. Handlers at the trial also offered in evidence *en masse*, and without reading, the complete deposition transcripts of five witnesses, totaling 205 pages in the printed record, together with the attached exhibits of 92 pages. R. 146-445 (O.P.),[3] R. 576. Included in the depositions was the testimony of Harold E. Kendall, President of plaintiff South Florida Growers Association, Inc. (R. 251-314 (O.P.)), and the testimony of Fred Piowaty, Secretary and Sales Manager of plaintiff Florida Lime and Avocado Growers, Inc. R. 314-332 (O.P.). State officers promptly objected on the grounds that the depositions should be read by handlers question and answer at a time, and that the exhibits should be offered in evidence individually, in order that previously prepared specific objections could be made. R. 576. These objections were renewed by state officers at the conclusion of the handlers' case (R. 625) and again at the conclusion of the trial. R. 683-84. The district court at the trial reserved ruling on the admissibility of these depositions and exhibits pending the filing of the written argument of counsel. R. 576, 625, 683-84. Thereafter, following the filing of trial briefs (R. 692-756), the district court ruled on the reserved objections and held that handlers' depositions and their attached exhibits were excluded from

[3] Testimony and exhibits not admitted into evidence, but included in the record as an offer of proof are designated "R. ——— (O.P.)."

evidence. R. 782. Handlers also offered into evidence *en masse* handlers' exhibits 23, 24, 25 and 26 for identification. R. 446-87, 576, 583, 603. The district court reserved ruling on their admissibility pending written argument of counsel. R. 603. After considering state officers' objections (R. 722-726) the district court excluded these exhibits for identification from evidence. R. 782. Because handlers' depositions and exhibits were excluded from evidence by the district court, there is *no* evidence that handlers have ever experienced difficulty in marketing their avocados in California. R. 782. Thus, there is no evidence that they have suffered any injury as a result of the California inspection statute or that they have been threatened with any injury. R. 780.

Because of handlers' reliance on matters excluded from evidence, their brief shows an almost total absence of "appropriate references to the printed record" as required by Supreme Court Rule 40(1)(e). When references are given, they usually refer to matters not in evidence. A summary of the references in handlers' brief to matters not in evidence is set forth in the appendix at page 62 et seq.

At the conclusion of the trial state officers stated to the district court that they had rebuttal evidence to adduce if any of handlers' depositions and attached exhibits were admitted into evidence. R. 684. The court then announced that state officers would be given an opportunity to rebut the evidence set forth in handlers' offer of proof if such material were re-

ceived in evidence. R. 684. In support of their right to adduce rebuttal evidence, state officers made an offer to prove through chemists A. J. Bingham, J. B. La Clair, Frederick L. Delano and Archie Shannon, that the oil test method utilized by handlers' deposition witnesses was faulty in that the test method (1) failed to recover all the available oil in the Florida avocados tested, and (2) produced erratic oil tests. R. 707-12, 749-56. These faulty test results were caused by the substitution of an inexpensive household Waring blendor (pictured at R. 749) for the heavy-duty ball grinder (pictured at R. 95, 750) prescribed by California regulation. R. 93, 708. Mechanically, the shearing action of the whirling blades in the blendor failed to break all of the pulp cells containing the avocado oil, while, in contrast, the steel balls in the grinder crushed the pulp cells so as to release all of the available oil for measurement. R. 708. State officers' offer of proof is relevant since it would discredit the testimony of handlers' witnesses who relied on the faulty oil test method. R. 621-22. The district court did not have occasion to consider state officers' offer of proof since it excluded from evidence handlers' depositions and attached exhibits. R. 782.

On the merits, the district court found that the California inspection statute was constitutionally valid under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment. R. 781. The California act also was found to be consistent with the Agricultural Marketing Agreement

Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 et seq., and with the marketing regulations for avocados grown in South Florida. 7 C.F.R. 915. Handlers' action was therefore dismissed on the merits by formal judgment entered September 22, 1961. R. 783-784.

SUMMARY OF ARGUMENT

I

California's avocado inspection law, which prohibits the sale in California of avocados containing less than 8 percent oil, violates neither the Commerce Clause nor the Equal Protection Clause.

The law was enacted in 1925 to remedy a local situation—the deception of consumers by the marketing of immature avocados and the resulting detriment to avocado growers.

The problem of immature avocados was a serious one because avocados are picked and sold to consumers in a hard state, and mere physical appearance does not indicate whether an avocado will ripen into a soft, palatable fruit or will shrivel and become rubbery and bitter. In order to remedy this situation, the California Legislature prohibited the sale of avocados containing less than 8 percent oil. For 37 years this 8 percent standard has effectively prevented the marketing of immature avocados in California.

A statute designed to remedy a local situation is valid under the Commerce Clause, even though it may incidentally affect interstate commerce. In *Milk Board* v. *Eisenberg Co.*, 306 U.S. 346, 352, this Court

observed that "the purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers in Pennsylvania" and concluded that the burden it imposed on interstate commerce—the payment of minimum prices to Pennsylvania producers—was constitutionally permissible.

In the recent case of *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, this Court emphasized again that the Commerce Clause leaves the states with broad powers to regulate commerce. This Court held that Detroit could enforce its Smoke Abatement Code against vessels moving in interstate commerce even though compliance would require structural alteration of the vessels.

Handlers in the present case concede that the California avocado inspection law is administered in an honest and nondiscriminatory manner. They maintain, however, that the 8 percent standard is inherently discriminatory against interstate commerce because, so handlers argue, the varieties of avocados grown in Florida, unlike the varieties of avocados grown in California, become mature when the oil content is less than 8 percent.

The facts do not support handlers' argument. Avocados grown in Florida may be divided into three classifications—Guatamalan varieties, hybrid varieties, and West Indian varieties. The district court found that the Guatamalan and hybrid varieties do attain or exceed 8 per cent oil content while in a prime

marketing condition. With respect to the West Indian varieties, the district court found that it was not commercially feasible to ship them across the continent to California, even in the absence of any California law, because of their poor shipping qualities and short retail store shelf-life. The Court also found that the West Indian varieties constituted only 12 percent of the total Florida shipments in the 1959-60 season and are declining in commercial importance.

The Equal Protection Clause does not require perfection. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-89. The single standard of 8 percent chosen by the California Legislature is both reasonable and workable.

II

California's avocado inspection law does not conflict with the Agricultural Marketing Agreement Act of 1937.

As in *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 444-46, there is no conflict between legislative objectives. The objective of the California statute is to prevent the deception of consumers by the marketing of immature avocados. The stated objective of the federal act is "to establish and maintain such orderly marketing conditions for agricultural commodities as will establish, as the prices to farmers, parity prices . . . ." Sec. 2(1), 7 U.S.C. Sec. 602(1).

Nor is California's avocado inspection law preempted by the Agricultural Marketing Agreement Act of 1937. Both the language and legislative history of

the act show that Congress did not intend to supplant state law. In *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 542, this Court marked the limits of the act in the following manner. "We assume, though it is not necessary to decide, that the Federal [Marketing Agreement] Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause."

A federal inspection certificate simply indicates compliance with federal law, and does not exempt goods from state police power requirements. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446-48; *Kake Village* v. *Egan*, 369 U.S. 60, 63-64. The present case is similar to *Reid* v. *Colorado*, 187 U.S. 137, where this Court held that Colorado could require cattle coming from Texas to be inspected for disease by a Colorado official, even though a federal official in Texas had previously inspected the cattle and certified that they were free from disease. *Campbell* v. *Hussey*, 368 U.S. 297, is inapposite because there the Court found a legislative intent to pre-empt state law.

Marketing orders have been aptly described by the United States Department of Agriculture as "self-help programs." Marketing Order No. 915 (formerly No. 969) regulating the handling of avocados grown in southern Florida is typical.

The growers of avocados in southern Florida voted for the marketing order in 1954. During each season, regulations are periodically issued which designate

starting dates for marketing avocados of a particular variety and minimum weight or diameter. E.g., 27 F.R. 9174-75. These regulations are issued as a matter of course upon the recommendations of the Avocado Administrative Committee, which is composed entirely of growers and handlers from southern Florida. Although handlers must generally submit their avocados to the Federal-State Inspection Service for inspection and certification of compliance with the applicable regulations, the Avocado Administrative Committee may issue exemption certificates upon proof "satisfactory to the committee" that the avocados are "mature." 7 C.F.R. Sec. 915.53.

In view of the extent to which private industry may formulate and administer marketing programs, including the southern Florida avocado program, one must conclude that Congress did not intend these programs to operate free of state law.

III

The correctness of the district court's order excluding various depositions and exhibits offered in evidence by handlers is not fairly comprised within their statement of the questions presented. *Roth* v. *United States*, 354 U.S. 476, 490 n.27. Nor is the order "plain error." See U.S. Sup. Ct. Rule, 40(1)(d)(2). The district court was correct in sustaining state officers' objection to an *en masse* introduction of five depositions 205 pages long. *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F.2d

199 (9 Cir.). The district court was also correct in sustaining the multitude of objections to handlers' exhibits 1 through 26.

ARGUMENT

I. The Judgment That the California Avocado Inspection Law Is Constitutional Is Supported by the Findings, and the Findings Are Supported by the Evidence.

The "Questions Presented" for review in handlers' brief do not question that substantial evidence supports the findings of the district court. Brief for Appellants, No. 45, pp. 3-5. Handlers' brief, in its discussion of the Commerce Clause, does mention, in passing, Findings Nos. 4, 8, 10 and 11. Brief for Appellants, No. 45, pp. 62-65; R. 779-80. Silence regarding the balance of the findings is a tacit admission that Findings Nos. 1, 2, 3, 5, 6, 7, 9, 12 and 13 are supported by the evidence. These findings are:

> "1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.
>
> "2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

"3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

"5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

"6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

"7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

"9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

"12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

"13. Plaintiffs have neither suffered, nor been threatened with irreparable injury." R. 778-780.

Handlers point to no exception which permits them to obtain a trial of the facts *de novo* in this Court. The findings of the district court with respect to the economics of avocado marketing and the biology of the avocado depended upon the credibility of the expert witnesses produced by each party at the trial. The three judges listened to their testimony, observed their demeanor, and found that the evidence on behalf of state officers was "more convincing and entitled to greater weight." 197 F. Supp. 780, 784. "Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (direct appeal from a district court); see Fed. R. Civ. P. 52(a): "Findings of fact shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See H.R. Doc. No. 588, 75th Cong., 3d Sess., 46-48 (1938).

Finding No. 4 of the district court states:

> "4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high." R. 779.

Handlers assert that this finding "flaunts the evidence that no varieties of Florida avocados attain 8 percent oil content with the timeliness and consistency essential for effective participation in the California market." Brief for Appellants, No. 45, pp. 64-65. In support of this argument, which state officers dispute, handlers give record citations to exhibits and depositions excluded from evidence. For example, plaintiffs' exhibits 17 and 21 for identification (R. 438-439 (O.P.), 443-444 (O.P.)) were excluded from evidence, as was the deposition of handlers' witness Harkness (R. 208-250 (O.P.)) R. 782; see Brief for Appellants, No. 45, p. 65. The testimony of handlers' witness Harding (R. 558-622), also cited, carried little weight with the district court. 197 F. Supp. 780, 784; see Brief for Appellants, No. 45, p. 65.

This finding that growers are tempted to pick avocados in an immature state of development in order to secure a high price is supported by evidence that the low point in California avocado production and mar-

keting occurs in the months of September, October and November. R. 665-666. California prices for avocados are thereafter depressed as the Fuerte variety matures and reaches the market. R. 666. The Fuerte is the leading California variety. R. 634. To illustrate, the f.o.b. Los Angeles price for a 13-pound net weight container of avocados ranged from $4.50 to $5.50 in September and October, 1960. R. 665-666. This price broke in mid-November, 1960, under the depressing effect of the marketing of Fuertes in large volume. R. 666. By early February, 1961, the price range for the 13-pound container was down to $2.75 to $3. R. 665.

Handlers thus have a powerful economic incentive to get into the California market ahead of the California Fuerte crop. What handlers would obviously like to do is to sell their avocados on the California market at a time when there is minimum competition from California avocados, even though their Florida avocados may not have reached their full maturity. Competition from immature California avocados would be prevented by the State's 8 percent oil statute which handlers here seek to nullify as to Florida avocados.

The existence of this temptation to market avocados prematurely is confirmed by the Secretary of Agriculture who found that many Florida handlers "have varied their individual grade standards to reflect variations in the supply, quality, and demand for Florida avocados during a particular season. Thus,

Florida avocados of undesirable quality frequently have been marketed in a manner designed to indicate that such avocados were of desirable quality." 19 F.R. 2419. Clearly then, finding No. 4 is supported by substantial evidence.

Handlers' brief No. 45 at page 63 also attacks finding No. 8 as being "unsupported by substantial evidence." In this finding, the district court found that:

> "8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season." R. 780.

The Waldin, Pollock, Fuchs and Trapp varieties listed in defendants' exhibit E (R. 488-492, 643, 644, 782) were identified as the leading West Indian varieties. R. 590, 669. The volume of commercial shipments of these varieties from south Florida dropped from 19.15 percent of total Florida commercial shipments in the 1955-1956 shipping season to 10.55 percent in the 1959-1960 shipping season. D. Ex. E, R. 488-492, 643, 644, 782.[4] The fact that commercial shipments of these varieties have lessened in recent years

[4] D. Exhibit E combines the Pollock with the Simmonds variety for the 1955-1956 south Florida shipping season, but because of reduced production only the Simmonds variety appears for the 1959-1960 shipping season. R. 488, 492, 643, 644, 782.

indicates reduced commercial importance. The decline in shipments can, no doubt, be attributed to the marketing disadvantages of the poor shipping qualities and "shelf life" of these West Indian varieties. R. 604-605, 666-667, 676-677.[5]

Finding No. 10 by the district court recites:

> "10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute." R. 780.

This finding is supported by the testimony, unrefuted, of Presley Wiggs, Assistant General Manager of Calavo Growers of California, who had personal experience in the marketing of Florida avocados from 1939 to 1957. R. 663-664. Wiggs testified that "it would not be commercially profitable to market West Indian varieties grown in Florida in California. The best or shortest in transit time that you can expect by refrigerated truck from Florida to California is five days. If fruit on that truck were presold . . . it would take probably another two or three days to dispose of that fruit. If it were not presold . . . it would take five or more days. This [distribution interval in California], plus the transit time of a minimum of

[5] It is interesting to note that a University of Florida publication describes West Indian varieties of avocados, such as Pollock, Fuchs, and Trapp, as "least hardy." Ruehle, *The Florida Avocado Industry*, U. Fla. Agricultural Experiment Stations, Bull. 602, p. 22 (Nov. 1958).

five days I believe would result in fruit which would not give satisfaction at the retail level. In my experience I have noted a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage . . . . From that point on they ripen quite fast. So that the retailer, who is primarily interested in making a profit, does not have sufficient time to turn their merchandise and make a profit." R. 667.

The testimony of Wiggs was corroborated by the testimony, also unrefuted, of Albert C. Jones, sales manager for Western Fruit Growers Sales Company of California, who had sold Florida varieties of avocados in the southwestern United States beginning in 1951. R. 675. Jones testified that the West Indian varieties have the poorest shipping qualities. R. 676. Again, the district court's finding is fully supported by the record.

Finding No. 11, cited in handlers' brief at page 64, states:

> "11. The California 8% oil content requirement is effective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit." R. 780.

Again, handlers simply refuse to accept that their exhibits 17 and 21 for identification and the deposition of Harkness were excluded from evidence by express order of the district court. R. 782. The argument, set out in handlers' brief No. 45 at pages 64 and 65, that this finding is inconsistent with these excluded exhibits and deposition must obviously be disregarded. *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518. Further, the finding is supported by direct testimony that the California inspection statute was effective in keeping immature avocados from being sold to California consumers. R. 631, 648, 666. The finding that the hybrid and Guatemalan varieties grown in Florida attain or exceed 8 percent oil content while in prime commercial marketing condition is supported by the testimony that Florida varieties, other than West Indian, reach an oil content as high as 20 percent while yet marketable and palatable (R. 587), that the Lula, Booth 7, Booth 8 and Linda varieties exceed 8 percent in oil content at maturity. R. 616-17.

In summary then, handlers make no claim that the findings are not supported by the evidence, with the exception of passing comment on four findings. As to these four, it is clear that substantial evidence in the record supports them. These findings, discussed hereafter, amply demonstrate the constitutionality of the state statute.

II. The California Avocado Inspection Law, Which Requires That Avocados Sold in the State Contain 8 Percent Oil, Is Constitutional Under the Commerce Clause and Under the Equal Protection Clause of the Fourteenth Amendment.

A. THE CALIFORNIA INSPECTION LAW DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE.

California's avocado inspection law has been in effect for 37 years. Calif. Stats. 1925, Ch. 350, pp 625, 633. The legislative objective was to protect consumers by preventing ". . . deception in the . . . sale of fruits, nuts and vegetables . . . ." *Id.* at 625; R. 628.[6] Avocados are picked and marketed in a hard state, at which time it is not easy to tell whether the fruit is mature. R. 628, 779. If the avocado is immature, it will shrivel up and become rubbery and unpalatable, with an unpleasant aftertaste. R. 628,

[6] A 1930 University of California study stated:

"In order to provide for uniformity in the maturity of the fruit at the time of harvesting and especially to prevent the sale of immature avocados, a practice which had become a menace to the industry, the California avocado growers in 1925 succeeded in having a state maturity standard of 8 percent fat or oil content established. This action has been productive of very great benefit to the industry in that it has effectively eliminated immature fruit, mostly windfalls or stolen fruit, from the markets." Hodgson, *The California Avocado Industry*, U. Cal. Agricultural Extension Service, Circular 43, p. 39 (April 1930).

See also, Stahl, *Changes In Composition of Florida Avocados In Relation to Maturity*, U. Fla. Agricultural Experiment Station, Bull. 259, p. 3 (May 1933):

"There is a tendency to harvest the avocado before it is mature enough to ripen normally, which results in putting a poor and flavorless product in the hands of the consumer. If picked too early, the characteristic good flavor of well-matured fruit is lacking and the fruit becomes rubbery, shrivelled, and darkened."

665, 779. Therefore, to prevent the marketing of immature avocados, the California Legislature adopted an oil content standard which expert opinion considers to be the best standard available. R. 648. David Appleman, Professor of Plant Nutrition at the University of California, positively testified that: "In my opinion it [oil content] is as good an index as we can have at present." R. 648.[7]

The California requirement was fixed at 8 percent because the oil content of avocados increases as the fruit matures on the tree, and fruit having 8 percent of oil when picked was found to soften normally into palatable fruit. R. 629, 648. Avocados with less than 8 percent oil content failed to soften normally and remained unpalatable. R. 648.

The burden of identifying those avocados which upon test will meet the 8 percent California maturity requirement falls alike on California and Florida handlers. R. 640. Since avocados increase in oil content during the period of growth, the problem is to obtain accurate oil tests as the avocados approach and reach maturity. R. 585, 629, 633, 779. California handlers perform their own continuous oil tests at their packing houses and start harvesting when the fruit reaches an 8 percent oil content. R. 670-671.

[7] Professor Appleman's opinion is supported by a University of Florida research study which found that "The fat content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit." Stahl, *Changes In Composition of Florida Avocados In Relation to Maturity*, U. Fla. Agricultural Experiment Station, Bull. 259, p. 39 (May 1933).

Handler South Florida Growers, Inc., also maintain a laboratory in its packing house. R. 680. Through the use of a refractometer and a ball-grinder machine by easily trained employees, this handler could make the necessary oil tests in Florida from appropriate random samples taken from graded, sized, and packed fruit. R. 680-681. Handler Florida Lime & Avocado Growers, Inc. could easily do the same. There is an increase in the oil content of avocado fruit of between 1 and 2 percent after picking. R. 653-54. By shipping to California avocados which tested 8 percent oil at the packing house, handlers would have a margin of safety insuring that such fruit would pass inspection upon arrival in California.

No claim is made by handlers that the California law is enforced dishonestly against them (R. 673), and it is conceded that the prescribed California oil test method is accurate. R. 93-97, 630, 748. The only issue is the assertion that the state inspection law is "inherently discriminatory." R. 673. This claim by handlers has no foundation in the record. The trial court found that the hybrid and Guatemalan varieties, which constitute approximately 88 percent of total Florida commercial shipments and are of increasing commercial importance, attain or exceed 8 percent oil content while in prime commercial marketing condition. Findings Nos. 9 and 11. R. 780. This finding has ample support in the record. Even Harding, the sole witness produced by handlers, testified that these va-

rieties attain oil content as high as 15 to 20 percent while palatable and marketable. R. 587.

Handlers' claim that California's avocado inspection statute operates to exclude Florida avocados from the California market is reduced for support to the West Indian varieties. It is true that those varieties do not generally attain 8 percent oil content until they are past their prime condition. R. 590, 780.

But the applicability of the State's inspection statute to the West Indian varieties of avocados is hypothetical for the reason that the West Indian varieties have such poor shipping qualities and such a short "shelf life" in the retail grocery stores, that their transportation across the continent from Florida to California for marketing would not be commercially feasible. R. 667, 676, 780. Moreover, these West Indian varieties are of declining commercial importance, having dropped to less than 12 percent of total south Florida shipments in the 1959-1960 shipping season. D. Ex. E, R. 488-492, 643, 644, 780, 782.[8]

It is possible, claim handlers, that shipments of West Indian varieties might in the future be made to California. Brief for Appellants, No. 45, pp. 62-63. But "Striking down a state law is not a matter of such light moment that it should be done by a federal

[8] Handlers are not aided on this point by their depositions which the district court treated as an offer of proof. R. 782. Harkness, in his deposition, testified that "the Waldins did not reach 8 percent [oil content] let's say, until December, which is the normal time for picking Waldins." R. 215 (O.P.); 782. If Waldins are excluded, the West Indian percentage of total shipments during the 1959-1960 season drops from 10.55 percent to 1.4 percent. D. Ex. E, R. 492, 643, 644, 782.

court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility." *Everson* v. *Board of Education*, 330 U.S. 1, 4 n. 2.

The carefully reasoned district court opinion concluded after an exhaustive analysis of the record that: "It is not discriminatory treatment, but equality of treatment, of which plaintiffs [handlers] seem to complain." 197 F. Supp. 780, 787. This conclusion by the trial court that the California inspection statute has even-handed application renders inapposite such cases as *Hood & Sons* v. *Du Mond*, 336 U.S. 525. In *Hood & Sons*, New York had denied a milk handler the right to operate an additional milk receiving plant within the state because the plant would compete with existing local milk plants. 336 U.S. 525, 530-31. This denial was held invalid under the Commerce Clause because it had "the practical effect of curtailing the volume of interstate commerce to aid local economic interests." 336 U.S. 525, 530-31. In contrast, handlers in this case make no claim of discriminatory enforcement of the local inspection statute (R. 672-73) and the district court found no inherent discrimination in its application. R. 780. The legislative objective of the California inspection statute is the protection of consumers from the deceptive marketing of immature avocados, not the protection of local entrepreneurs. R. 628.

These facts bring this cause within the familiar principle that foods which are unfit for human con-

sumption "are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution." *Sligh* v. *Kirkwood*, 237 U.S. 52, 59-60. A host of decisions have applied this principle to varying factual situations. The common thread in each is that local inspection of foods intended for human consumption, to protect consumers, will be permitted where the interference with the national economy is justified by the importance of the resulting protection of community interests. Consistent with the Commerce Clause, a state may pass nondiscriminatory inspection laws regulating the introduction of diseased cattle and sheep within their borders (*Mintz* v. *Baldwin*, 289 U.S. 346; *Asbell* v. *Kansas*, 209 U.S. 251; *Reid* v. *Colorado*, 187 U.S. 137; *Rasmussen* v. *Idaho*, 181 U.S. 198; *Smith* v. *St. Louis & Southwestern Ry. Co.*, 181 U.S. 248; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U.S. 613), and preventing the sale of oleomargarine colored to look like butter (*Plumley* v. *Massachusetts*, 155 U.S. 461), and may require the disclosure of ingredients and correct labeling of foodstuffs brought into the state for sale (*Savage* v. *Jones*, 225 U.S. 501; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497).

State officers submit that the findings of the district court that the California inspection statute is *not* discriminatory, and therefore is valid under the Commerce Clause, is supported by the evidence. The California statute meets the test of constitutionality

stated by this Court in *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-44:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution'."

B. THE CALIFORNIA INSPECTION LAW DOES NOT DENY HANDLERS THE EQUAL PROTECTION OF THE LAWS.

In determining the constitutionality of Agricultural Code, Section 792, as applied to handlers in the light of the findings of the district court, this Court starts with the principle that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

The California Legislature acted upon a rational basis in enacting the avocado inspection statute. The requirement of 8 percent oil content is reasonably designed for the legislative objective of keeping immature avocados off the market. R. 628, 631, 648, 666. The state statute does not create a special class. These handlers are subject to the same avocado oil content

standard as are all other persons who sell avocados in California.

Just as handlers' proof in the district court fails to support their claim of "inherent discrimination" under the Commerce Clause, it fails to support their claim of discrimination under the Equal Protection clause of the 14th Amendment.

III. The California Avocado Inspection Law Does Not Conflict With, and Is Not Pre-empted by, the Agricultural Marketing Agreement Act of 1937.

A. NO CONFLICT EXISTS BETWEEN THE FEDERAL AND STATE STATUTES.

The California avocado inspection statute was enacted by the State Legislature to prevent the marketing to consumers of immature, unpalatable fruit. R. 628. The three-judge district court found that:

> "To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit." 197 F. Supp. 780, 783.

The State's inspection statute, as applied to handlers, therefore falls within regulatory categories which, since colonial days, have been held appropriate to the local regulation of trade. See Article I, Section 10, Clause 2, of the Constitution; *Turner* v. *Maryland*, 107 U.S. 38, 51-54. Quarantine and other health measures, highway and safety laws, regulation of water-

ways and local public utilities, conservation and game laws, commodity inspection laws, all relate to matters of prime local concern which because of number and diversity may never be adequately dealt with by Congress. See *California* v. *Thompson*, 313 U.S. 109, 113; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185. And even where Congress has acted, the exercise by a state of its police power is superseded only where the conflict is so direct and positive that the federal and state acts cannot be reconciled. *Sinnot* v. *Davenport*, 22 How. 227, 243.

Comparison of the federal and state statutes here involved show that no conflict *per se* exists between them. *Parker* v. *Brown*, 317 U.S. 341. The objective of Congress in enacting the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, was the establishment of orderly marketing conditions for agricultural commodities in interstate commerce so as to establish "parity prices" for farm products.[9] In the instant case, the announced objective of the marketing "self-help" program for growers and handlers of south Florida avocados was the tailoring of the supply of Florida avocados to the demand so that the prices received by Florida growers will equal or exceed parity. 19 F.R. 2419-20.

The California statute contains no reference to parity. Its legislative objective is entirely different

[9] Parity prices is a shorthand phrase for agricultural commodity prices which will accord farmers a purchasing power equivalent to the purchasing power held by them in a selected base period. See *United States* v. *Rock Royal Co-Op.*, 307 U.S. 533, 574-75.

since it is intended to protect consumers by preventing deception in the marketing of immature avocados. R. 628. See p. 25, *supra*. In comparison to the federal act which seeks to increase the monetary returns to growers, the state law primarily seeks to protect the interests of the consumer. Successful prevention of deception in the marketing of avocados in California will certainly not frustrate the attainment of the objectives of the federal statute and of the south Florida avocado marketing program. In fact, the "extremely good consumer acceptance of avocados" which the trial court attributed (187 F. Supp. at 786 n. 7) to California's avocado inspection statute should cause Florida growers to receive parity (or higher) prices for their avocados marketed in California.

B. CONGRESS DID NOT INTEND TO PRE-EMPT THE FIELD OF COMMODITY INSPECTION IN ENACTING THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Section 10(i) of the federal act[10] provides:

> "The Secretary of Agriculture . . . is directed, . . . in order to obtain uniformity in the formulation, administration, and enforcement of Federal and *State programs* relating to the regulation of the handling of agricultural commodities, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities . . . to issue orders . . . complementary to orders or other

[10] Sec. 10(i) was added by 49 Stat. 750, 767, 7 U.S.C. 610(i). Appendix p. 33, *infra*.

regulations *issued by such authorities. . . .*" (Emphasis added.)

This section expressly shows the congressional intent that the states were to retain their traditional powers of commodity inspection. This construction of the act is emphasized by the committee reports of the Congress which enacted Section 10(i). These reports state:

> "This authorization is to carry out the declared policy of the title and looks to securing voluntary uniformity in the formulation, administration, and enforcement of State and Federal programs relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products."
>
> * * * * *
>
> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid Federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other." S. Rep. No. 1011, 74th Cong., 1st Sess. 15 (1935); compare H. R. Rep. No. 1241, 74th Cong., 1st Sess., 22-23 (1935).

This committee language, and in particular the reference to each sovereignty operating "in its own sphere," emphasizes that the powers given to the

Secretary of Agriculture were to be exercised concurrently with, and in co-operation with, the police powers of the states. Congressional debates on the act similarly show that local requirements were to remain effective. In response to a question on the floor of the House regarding the effect of the 1935 amendment [11] on New York milk regulations, Representative Martin Jones, Chairman, House Agricultural Committee, stated: "Within the state, of course, such laws may be enacted as the state deems proper. We do not undertake to keep them from shipping in, and we do not authorize them to ship in. We say when they ship from some other state, they must ship in subject to the same regulatory measures that exist in a particular area. In many instances the states may wish to enact supplementary legislation, if they wish to make the program fully effective." 79th Cong. Rec. 9465 (1935). Representative Andresen from Minnesota stated: "The farmers out in our section will have to meet the grade and sanitary requirements of the State of New York or the other states. . . ." 79th Cong. Rec. 9480 (1935).

[11] Section 8(3) of 48 Stat. 31, 35, had authorized the Secretary of Agriculture to license all handlers and processors engaged in handling agricultural commodities in interstate commerce. Such licenses could be revoked if such person violated the marketing regulations issued under the act. Section 8(3) was stricken out by 49 Stat. 750, 753, and replaced by Section 8(c) which authorized the issuance of marketing "orders" governing the handling of agricultural commodities in interstate commerce. The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, re-enacted Section 8(c), 7 U.S.C. 608c.

It was undoubtedly this clear language in the act, supported by its legislative history, which caused the Court to conclude that the marketing act "does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the commerce clause." *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 542.

IV. The "Self-Help" Size and Weight Restrictions on the Shipping of Avocados Grown in South Florida Do Not Invalidate the California Consumer-Protection Avocado Inspection Law.

A. THE FEDERAL "SELF-HELP" AVOCADO REGULATIONS WERE NOT INTENDED TO SUPERSEDE LOCAL AVOCADO INSPECTION LAWS.

Handlers argue that compliance with the federal weight and size requirements for south Florida avocados (*E.g.*, 19 F.R. 4404) arms them with a sword with which to dispatch the California avocado inspection statute. But the language and the history of the federal avocado marketing regulations show that they were intended to have application only to the south Florida avocado growing area for the monetary benefit of the south Florida avocado industry, and were not intended to supersede state inspection laws designed for the protection of the local consumers.

The objective of the federal marketing act is the establishment, by exercise of the power conferred on the Secretary of Agriculture, of "orderly marketing conditions for agricultural commodities in interstate commerce," such as will tend to establish "parity

prices" for farm products. Agricultural Marketing Agreement Act of 1937, Sec. 2(1), 7 U.S.C. 602(1). Appendix, p. 55, infra. In order to raise the dollar returns on their avocados, Florida growers and shippers requested that the Secretary of Agriculture establish marketing regulations which would tailor "the supply of avocados available for sale in fresh market channels to the demand in such outlet. . . ." 19 F.R. 2419-20.

Following initiation of the marketing program by Florida growers and handlers (19 F.R. 909, 2418), the Secretary of Agriculture held a referendum limited to avocado growers located in south Florida. 19 F.R. 2789, 3439. In addition, Florida avocado handlers approved marketing agreements which were identical in form to the marketing order approved by Florida growers. 19 F.R. 909, 3439.[12]

Thereafter, the Secretary of Agriculture appointed a committee of Florida growers and handlers to administer the program. 7 C.F.R. 915.20. Members are selected from a slate nominated by the south Florida

[12] Section 8c(8) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(8), provides that no marketing order shall be effective unless first approved by either two-thirds of the producers of the commodity in the marketing area involved or by producers of two-thirds of the volume of the commodity produced in the marketing area involved. Approval by handlers handling 50 percent of the volume of the commodity produced in the production marketing area is also generally required. Section 8c(8), 8c(9). Section 8c(11)(B) requires that marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, . . . which the secretary finds practicable, consistently with carrying out such declared policy [of the act]." Appendix p. 60, infra.

avocado industry. 7 C.F.R. 915.22. Funds to finance the marketing program come from assessments levied on the south Florida avocado industry. 7 C.F.R. 915.40-.41. This marketing program, self-imposed and self-financed, must be terminated by the Secretary of Agriculture upon majority vote of the growers affected. Agricultural Marketing Agreement Act of 1937, Sec. 8c(16)(B), Appendix, p. 60, *infra*.

Harding, called as a witness by handlers, testified that the federal south Florida marketing program ". . . puts the control . . . of regulations into the hands of the growers, the handlers, the shippers. . . ." R. 558, 599-600. A confirming publication of the United States Department of Agriculture states:

> "The Act opens the way to wider use of self-help stabilization programs and reflects the desire of the administration and the intent of Congress to give farmers the legal tools needed to take active role in reducing the cost of farm programs and in preventing the accumulation of surpluses . . . The programs differ from other agricultural adjustment measures in that they combine voluntary and regulatory control—initiated, set up and directed by the industry. Each industry bears the cost of administering the program. The programs also demand aggressive group participation in their operation and development, with resultant interest and emphasis placed upon furthering agricultural private enterprise.
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> "Administration of programs for commodities other than milk is handled by a board of producers, or of producers and handlers selected by the Secre-

tary of Agriculture. Members may represent both producers and handlers and are selected from a slate recommended to the Secretary by the groups concerned." U.S. Dept. of Agriculture, *Self-Help Stabilization Programs*, 1, 5 (Nov. 1961).

In further elaboration, the United States Department of Agriculture explains:

"Marketing agreements and orders are designed to improve returns to growers through orderly marketing. They are self-help programs, through which fruit and vegetable growers can work together to solve marketing problems that they cannot solve individually.

"The [Marketing] Act itself does not impose regulations over the marketing of any agricultural commodity. *It merely provides the authority under which an industry can develop regulations to fit its own situation and solve its own marketing problems.*" (Emphasis added.) U. S. Dept. of Agriculture, *Marketing Agreements and Orders*, AMS-230, p. 3 (rev. ed. Nov. 1961).

In summary then, the administrative regulations, which handlers rely upon to strike down the California inspection law, originated with Florida growers and shippers of avocados.[13] It cannot be imagined that

[13] Handlers' offer of proof shows that the Secretary of Agriculture has always, without exception, followed the Avocado Administrative Committee's recommendations regarding the terms of the Secretary's maturity regulations governing the handling of avocados grown in south Florida. R. 206 (A.P.). From 1954 to 1956, handler corporations were represented on the Avocado Administrative Committee by Harold Kendall, President of South Florida Growers Association, Inc. (R. 191-92 (O.P.), 251 (O.P.)) and by Fred Piowaty, Secretary and Sales Manager of Florida Lime and Avocado Growers, Inc. (R. 191-92 (O.P.), 314 (O.P.)).

Congress intended these administrative marketing regulations "initiated, set up and directed by the industry" to be used as a weapon to strike down even-handed state inspection laws designed to protect local consumers from being deceived into buying immature fruit.

B. THE STATE INSPECTION STATUTE DOES NOT INTERFERE WITH THE ADMINISTRATION OF THE FEDERAL SOUTH FLORIDA MARKETING PROGRAM.

Section 8(e)(11)(B) of the federal act, 7 U.S.C. 608c(11)(B), provides that ". . . orders issued under this section shall be limited in their application to the smallest regional production area, or regional marketing areas, or both, as the case may be, which the Secretary [of Agriculture] finds practicable, consistently with carrying out such declared policy." Pursuant to this direction of Congress, the secretary limited the avocado program to avocados grown in specific counties in south Florida (7 C.F.R. 915.4) despite the fact that some avocados are commercially marketed from groves in north Florida. 19 F.R. 2420. Exceptions to the federal shipping regulations include (1) avocados grown in Florida but outside the controlled production area (7 C.F.R. 915.4), (2) daily shipments not exceeding 55 pounds (7 C.F.R. 915.55 (d), 915.140), (3) Christmas gift shipments not exceeding 20 pounds (7 C.F.R. 915.140), and (4) avocados "determined" by the Avocado Administrative Committee to be "mature" and granted an exemption certificate. 7 C.F.R. 915.110. No federal regulation is applied to avocados coming within these classes.

The operation of the federal avocado shipping restrictions, for those avocados which are regulated, ceases after the fruit leaves the specified south Florida counties constituting the area of production. 7 C.F.R. 915.4, 915.10, 915.54. Hence, there is no conflict in the administration in Florida of the federal avocado marketing program by subjecting these avocados to subsequent state inspection. It is well-established that such subsequent state inspection by a state made in protection of its consumers is constitutionally permissible. *Cloverleaf Co. v. Patterson,* 315 U.S. 148, 162.

In *Huron Cement Co. v. Detroit,* 362 U.S. 440, the boilers in appellant's vessels had been inspected by the Coast Guard and the vessels licensed pursuant to federal law. The City of Detroit commenced criminal proceedings under its smoke abatement code, after the necessary cleaning of the vessels' fires, while the vessels were docked at Detroit, caused the emission of excessive smoke. The city's code was held valid despite the fact that structural alterations would be required in order to comply with the code. Analysis of the federal boiler inspection law showed a congressional intent to afford protection to passengers and crew from the perils of maritime navigation, whereas the local inspection law was intended to eliminate air pollution to protect the health of the community. Id., at 445. Finding no conflict between the federal and local laws, the Court held that appellant's federal licenses availed it nothing, saying: "The mere possession of a federal license, however,

does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." Id., at 447.

Similarly, in the instant case, Congress has given no hint in the language of the federal marketing act that an avocado inspection certificate authorizing shipment of avocados from the controlled south Florida area of production, should immunize handlers from the California avocado inspection statute. Had Congress so intended, it could have used appropriate language. Thus for example, the act of March 3, 1905, 33 Stat. 1264, expressly provided that certificates of cattle inspection issued under the act authorized shipment of the cattle "without further inspection or the exaction of fees of any kind, ..." See *Mintz v. Baldwin*, 289 U.S. 346, holding that the New York dairy cattle quarantine law was valid and not in conflict with the act of March 3, 1905, 33 Stat. 1264.

Campbell v. Hussey, 368 U.S. 297, heavily relied upon by handlers, is inapposite. Brief for Appellants, No. 45, pp. 48-49. The Tobacco Inspection Act, 49 Stat. 731, 7 U.S.C. 511-511q, there construed, authorized the Secretary of Agriculture to establish type standards for domestic tobacco. Congress in the statute stated that "without *uniform standards* of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce;

that such fluctuations constitute a burden upon commerce and make the use of *uniform standards* of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." (Emphasis added.) 7 U.S.C. 511a. The Court found in this language the congressional intent that there should be but one "uniform standard" of tobacco classification and that the federal statute thereby "preempted the field and left no room for any supplementary state regulation concerning those same types." *Campbell v. Hussey*, 368 U.S. 297, 301.

In sharp contrast, the Agricultural Marketing Agreement Act of 1937 provides for the establishment of farmer "self-help" commodity stabilization programs which are not uniform, but instead are tailored to fit the needs of the farmers in specific marketing or production areas. Thus Congress provided in Section 8c(11)(B) of the marketing act, 7 U.S.C. 608c(11)(B) that except in the case of milk, marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, . . . which the Secretary finds practicable. . . ." and in Section 8c(11)(C), 7 U.S.C. 608c(11)(C), required that regulations "applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms . . . as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas." Appendix p. 60, infra. Con-

gress thus expressly showed its intent that the regulations issued by the Secretary of Agriculture under the marketing act should not be uniform throughout the nation, but should be individually adopted to conform to the desires of the producers and handlers immediately concerned. It is clear that Congress did not intend to deprive states of their traditional powers to inspect commodities intended for local consumption. See p. 34, *supra*.

Again handlers rely on an inappropriate precedent in citing *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148. In this case an Alabama inspection statute establishing standards for "renovated butter" was held to conflict with the federal renovated butter inspection and tax statutes, Int. Rev. Code of 1954, Sec. 4811-18, 68A Stat. 571, formerly Int. Rev. Code of 1939, Sec. 2320-27, 53 Stat. 252. The conflict found by the Court was twofold: (1) the state confiscation prevented any subsequent federal regulation, and (2) state confiscation destroyed a product intended to be subsequently taxed by Congress. The Court in its opinion distinguished between the case where a state statute "interferes with production under federal supervision" and state "confiscation after production because of a higher standard demanded by a state for its consumers. *The latter type is permissible under all the authorities*". (Emphasis added.) *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, 162. The Alabama inspection statute would have been held valid had it applied to the finished butter product subsequent to federal in-

spection and regulation. This is made clear in the Court's statement: "But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the requirements of the pure food laws of that state." 315 U.S. 148, 167.[11] As the district court below pointed out, 197 F. Supp. at 788, *Cloverleaf Co.* v. *Patterson* supports the validity of the California avocado inspection statute since the operation of the federal south Florida avocado shipping restrictions cease after the avocados leave the south Florida area of production (7 C.F.R. 915.4, 915.51, 915.61) and before operation of the California inspection law at California wholesale produce terminals. R. 630.

These considerations compel the conclusion that the federal act here involved does not prevent enforcement of the State's avocado law.

V. The Evidenciary Rulings of the District Court are Not Before this Court for Review.

Handlers and state officers stipulated in writing that handlers might take the depositions of certain witnesses in Florida. R. 144 (O.P.). The stipulation provided that the depositions "when taken may be read and used in evidence . . . subject to the same

[11] In *Cloverleaf*, 315 U.S. 148, 157-58, the Court cited *Savage* v. *Jones*, 225 U.S. 501 in which it was held that Indiana could validly apply its statute requiring disclosure of formulas on foods offered for sale in the state because the incidence of the federal Pure Food and Drugs Act, 34 Stat. 768, had occurred prior to state regulation.

objections and exceptions as if the said witnesses were personally present on the stand. . . ." (Stipulation of Counsel, dated January 9, 1958, attached to the transcript of depositions, and filed as part of the original record herein).[15] Handlers at the trial made no effort to read the deposition testimony into the record, but instead offered the depositions, totaling 205 pages in the printed record, and attached exhibits,[16] totaling another 92 pages, into evidence *en masse*. R. 146-351 (O.P.), 353-445 (O.P.), 576. State officers promptly objected on the grounds that the depositions should be read by handlers question and answer at a time, and that the exhibits be offered into evidence individually, in order that state officers would have proper opportunity to make specific objection. R. 576. Fed. R. Civ. P. 26(d), 26(e); *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F. 2d 199, 212-13 (9th Cir.). The district court reserved ruling on the admissibility of the depositions and attached exhibits pending the filing of written argument by counsel. R. 576, 625, 683-85. State officers' objections were renewed at the conclusion of handlers' case in chief (R. 625) and at the conclusion of the trial. R. 683-85.

[15] The parties, through their respective counsel of record, on January 29, 1962, filed with the Court their stipulation authorizing reference in briefs and argument to the original record in this cause, including any portion which has not been printed.

[16] Plaintiffs' (handlers') exhibits for identification 1 to 22.

Following the receipt of the briefs of counsel (*e.g.* R. 692-756), the district court in a post trial formal order ruled:

> "2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish are *not* admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;
> "3. Plaintiffs' exhibits for identification 1 through 26, are *not* admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs . . . ." (Emphasis added.) R. 782.

Plaintiffs' (handlers') exhibits 23, 24, 25 and 26 for identification were also offered into evidence *en masse* by handlers. R. 603.[17] The district court reserved its ruling on their admissibility (R. 603), having previously ruled that such evidence to be immaterial. R. 574, 577. After considering state officers' objections that these exhibits constituted (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) were irrelevant, the district court excluded defendants' exhibits 23, 24, 25 and 26 for identification from evidence. R. 722-726, 782.

Neither in the questions presented, nor in the text, does the Brief for Appellants question the correctness of these evidenciary rulings by the district court. They

[17] Plaintiffs' (handlers') exhibit 23 for identification was marked for identification at R. 576. Plaintiffs' (handlers') exhibits 24, 25 and 26 for identification were marked for identification at R. 583. These exhibits may be found at R. 445-87, although excluded from evidence. R. 782.

may not therefore question on this appeal the correctness of these rulings. U.S. Sup. Ct. Rules, 40(1)(d)(2); *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 177-79, aff'd, 305 U.S. 124; *Roth* v. *United States*, 354 U.S. 476, 490 n. 27.[18]

At the trial, handlers took the position that their depositions and attached exhibits became evidence in the case because state officers made reference to them in their original motions to dismiss in the district court. R. 61, 99, 563, 575; *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774, reversed 362 U.S. 73. The district court denied this contention of handlers and ruled that the depositions and attached exhibits were not in evidence. R. 575.

This ruling of the district court that the depositions and exhibits were not placed in evidence by the earlier proceedings was manifestly correct. See *United States* v. *City of Brookhaven*, 134 F.2d 442, 447 (5 Cir.). The reference to handlers' depositions and attached exhibits in state officers' earlier motions to dismiss (R. 60-61, 98-99) was proper since the district court is permitted to inquire by affidavit and deposition into the facts as they exist when the question of its jurisdiction is raised. *Land* v. *Dollar*, 330 U.S. 731, 735 n. 4. State officers' concessions that the district court could look at the contents of the depositions and exhibits were made only for the purpose of question-

[18] In *Paul* v. *Florida Lime*, No. 49, this term, the Brief for Appellants at pages 14-23 and 27-46, deals with the evidentiary objections sustained by the district court to handlers' depositions and attached exhibits.

ing the equity jurisdiction of the district court, and certainly were not intended to be a waiver of state officers' right to object to evidence offered by handlers at the trial. The rule in analogous cases is that such concessions are provisional for the purposes of the motion only. *M. Snower & Co.* v. *United States*, 140 F.2d 367, 370 (7th Cir.), motion for judgment on the pleadings; *Bognaud* v. *White*, 170 F.2d 323, 327 (6th Cir.), motion for summary judgment; *Propo Corp.* v. *Pressure Can Corp.*; 234 F.2d 700, 703 (7th Cir.) cert. denied, 352 U.S. 892, motion for summary judgment. Handlers cite no authority, nor has any precedent been found, to support the novel assertion that state officers waived their evidenciary objections by the filing of motions to dismiss.

There is no occasion here to treat the action of the trial court, in reserving its ruling on the admissibility of handlers' depositions and attached exhibits, as "plain error not presented" under Rule 40(1)(d)(2), Revised Rules of the Supreme Court. Handlers, upon state officers' objection, were under a duty to read the depositions line by line into the record. Fed. R. Civ. P. 26(d), 26(e). *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F.2d 199, 212-13 (9th Cir.). A deposition is not an instrument and, unlike documentary evidence, it cannot be offered in evidence as a whole, without reading it. The reason is that the examination ordinarily takes place before an officer without the qualifications or the authority to hear objections or rule out inadmis-

sible matter. Similarly the deposition may be taken for purposes of discovery as well as for use as evidence. Hence, in introducing a deposition, it is necessary that the parties be given an opportunity to object to or move to strike out individual questions or answers. The court in fairness to the parties should rule on the objections. This necessitates the reading of the deposition into the record. Neither the district court, nor this Court on appeal, has the burden of sifting through the 205 pages of depositions in the printed record and the additional 134 pages of exhibits (R. 146-351 (O.P.), 353-487 (O.P.)), in order to separate out those portions which might be relevant under the issues in the cause, and admissible into the record under the rules of evidence.

Further, the record indicates that it was *handlers* who requested that the district court defer ruling on the admissibility of the depositions and exhibits to the post trial argument of counsel. R. 646. Any error was thus invoked at the instance of handlers, who cannot now assert prejudice. See *Mercelis* v. *Wilson*, 235 U.S. 579, 583; *United States* v. *St. Louis Trans. Co.*, 184 U.S. 247, 249.

Lastly, as previously summarized, *supra* pages 10-11, the district court reserved the state officers the right to adduce rebutting evidence in the event it should be subsequently decided that handlers' depositions and exhibits are admissible into evidence. R. 782; 197 F. Supp. 780, 782 n. 2. If, arguendo, error was committed, the Court on this appeal cannot look to the

contents of handlers' depositions and exhibits for the purpose of deciding the merits of the cause, but must reverse and remand for further proceedings in the district court. *Idaho and Oregon Land Co.* v. *Bradbury,* 132 U.S. 509, 518. In any further proceedings, state officers would then have an opportunity to introduce their refutatory testimony. R. 707-712.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

I. The Applicable Portions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as Amended, 7 U.S.C. 601, et seq., Provide:

Sec. 2. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623 and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets and (b) authorizing no action under sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623 and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

* * * * *

Sec. 8c Orders regulating handling of commodity.

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities.

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof . . . fruits . . . .

* * * * *

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order

which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided,* That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds

of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement.

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601—604, 607, 608, 608a, 608b,

608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability.

No order shall be issued under this section unless it regulates the commodity or product covered thereby in the same manner as, and is ma[illegible] applicable only to persons in the respective classes of industrial or com-

mercial activity specified in a marketing agreement upon which a hearing has been held. . . .

(11) Regional Application.

* * * * *

(B) Except in the case of milk and its products orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

* * * * *

Sec. 8c 16) Termination of orders and marketing agreements.

* * * * *

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such

representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have during such representative period produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

Sec. 10. Administration.

* * * * *

(i) Cooperation with State authorities; imparting information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be nec-

essary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided,* That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

II. References in Handlers' Brief to Matters Not in Evidence.

Examination of handlers' statement of the case, as well as the argument portion of their brief, shows an almost total absence of "appropriate references to the printed record" as required by Supreme Court Rule 40(1)(e). *Houston* v. *Southwestern Tel. Co.*, 259 U.S. 318, 325. When references are given, they are to matters not in evidence, such as (1) documents which were not even offered into evidence (e.g. defendants' deposition exhibits P, Q, R and S for identification, R. 498-99, 500, 501, 502-04), (2) deposition transcripts and attached exhibits which were offered but excluded from evidence (R. 146-445 (O.P.), 782), and (3) statements made during the trial by counsel for handlers e.g. Brief for Appellants, p. 9, referring to R. 622-623. Many page citations are to exhibits without citation to the page num-

ber in the record where the exhibit was offered or received in evidence. For example, handlers' brief on pages 16 and 17 merely refers to "(R. 356, 361)" which are to plaintiffs' exhibits 4 and 7 for identification. These exhibits were offered at R. 575-76 and excluded at R. 782. In many instances, handlers make statements with no record citations whatsoever. *E.g.*, Brief for Appellants, 6, 7.

The depositions and attached exhibits offered in evidence by handlers (R. 576) but excluded from evidence (R. 782), were considered by the district court as an offer of proof. R. 782. An offer of proof, even though set forth in the printed record, can be considered on appeal only "for the single purpose of passing upon the exceptions taken to the admission or rejection of parts of . . . [the evidence], and not for the purpose of deciding whether the whole evidence supported the findings of the [trial] court." *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518; *Buckstaff* v. *Russell*, 151 U.S. 626, 633-38. Neither in handlers' Jurisdictional Statement in No. 45, nor in the Brief for Appellants in No. 45, do handlers assign error to the ruling of the district court excluding from evidence handlers' depositions and the attached exhibits. Therefore, the references to the contents of handlers' offer of proof made in the Brief for Appellants which are directed to the merits of the posed constitutional issues are improper and should be disregarded. U.S. Sup. Ct. Rules, 40(1)(e), 40(2); *Houston* v. *Southwestern Tel. Co.*, 259 U.S. 318, 325. For these reasons, handlers' statement of the case in critical passages misstates the record.

For example, the only reference to the record supporting the statements made on page 7 of the Brief

for Appellants is to "R. 254." This reference is to the deposition of Harold E. Kendall (R. 251-(O.P.)) which was expressly excluded from evidence by the district court. R. 782. Page 8 of handlers' brief cites plaintiffs' exhibit 3 for identification, found at R. 355, which was excluded from evidence. R. 782. Also cited on page 8 are the depositions of David M. Biggar (R. 146 (O.P.), 151-152 (O.P.)), Fred Piowaty (R. 314 (O.P.), 315-316 (O.P.)), and R. M. Wimbish (R. 332 (O.P.), 349-350 (O.P.)). These depositions of Biggar, Piowaty and Wimbish, offered in evidence by handlers, were excluded from evidence by the district court. R. 782. On page 9, handlers' brief again cites the deposition of Biggar (R. 207) which was excluded from evidence. R. 782. Also cited on page 9 are the statements of counsel for handlers (R. 622-623) and plaintiffs' exhibit 9 for identification (R. 364) which was excluded from evidence by the district court. R. 782.

Handlers' brief on pages 10 to 12 discusses in detail the deposition by Roy W. Harkness (R. 208-50 (O.P.)), offered in evidence by handlers (R. 576) but excluded from evidence by the district court. R. 782. In the course of their discussion of the contents of the excluded deposition of Harkness, handlers cite on page 11 of their brief to their exhibit 16 for identification (R. 389-437 (O.P.)), which was offered in evidence by handlers (R. 576) but excluded from evidence. R. 782. In the footnote on page 11, on page 12, and in the footnote on page 13, handlers refer to the deposition of Harkness (R. 208-50 (O.P.)) which was excluded from evidence. R. 782. Page 13 of this brief cites to plaintiffs' exhibits 4, 7, 9, 14 and 16 for identification. These exhibits for identification, offered

in evidence by handlers (R. 576), were excluded from evidence by the district court. R. 782.

Pages 13 and 14 contain statements regarding the oil content of the Waldin and Booth varieties of avocados with supporting citations to plaintiffs' exhibits 4 and 7 for identification. R. 356-57 (O.P.), 361-62 (O.P.). These exhibits are not in evidence. R. 782. The statements regarding the Lula, Booth 7, Hickson, Booth 1 and Taylor varieties of avocados on pages 15-17 in handlers' brief are also cited to pages in the record on which appear plaintiffs' exhibits 4 and 7 for identification. R. 356-57 (O.P.), 361-62 (O.P.). Handlers' brief on page 15 also cites the deposition of Kendall (R. 257 (O.P.)), plaintiffs' exhibit 17 for identification (R. 438-439 (O.P.)), and plaintiffs' exhibit 21 for identification. R. 443-444 (O.P.). The deposition and exhibits were excluded from evidence by the district court. R. 782.

Page 18 of handlers' brief continues the practice of citing to matters not in evidence. This page of the brief cites to plaintiffs' exhibit 22 for identification (R. 445 (O.P.)), offered in evidence by handlers (R. 576) but excluded from evidence by the district court. R. 782. Again, handlers rely on the depositions of Harkness and Piowaty, although excluded from evidence (R. 782), in their discussion on page 18 of the oil content of Florida avocados. In the footnote on page 19 of their brief, handlers cite to interrogatories (R. 48-51, 53-59) which were neither offered nor received in evidence by the district court. Handlers refer to the excluded deposition of Kendall (R. 251-314 (O.P.)) in support of the contentions made on page 20 of their brief regarding the marketing of Florida avocados in California.

In connection with the testimony of Harding, handlers' brief on page 22 relies on the contents of plaintiffs' exhibit 23 for identification (R. 446-67 (O.P.)) which was excluded from evidence by the district court. R. 782. On page 23, handlers' brief gives the citation "(R. 452)," which is also a reference to the excluded plaintiffs' exhibit 23 for identification. The brief on page 23 makes reference to plaintiffs' exhibit 24 for identification (R. 468-77 (O.P.)) which was excluded from evidence. R. 782. Handlers' brief on page 24 also refers to plaintiffs' exhibit 25 for identification (R. 478-85 (O.P.)) without any acknowledgment that this exhibit was expressly excluded from evidence by the district court. R. 782. Pages 25 to 27 of the brief contain summaries of excluded exhibit 25 for identification and therefore improperly refer to matters not in evidence.

The Brief for Appellants on page 28 refers to "(R. 482)" which is a portion of excluded plaintiffs' exhibit 25 for identification. R. 478-85 (O.P.), 782. Also, this page cites and quotes from excluded plaintiffs' exhibit 26 for identification. R. 486-87 (O.P.), 782. Page 29 of the brief does not contain a single reference to the record. Page 30 makes reference to plaintiffs' exhibits 1 and 2 for identification (R. 353 (O.P.), 354 (O.P.)) which were excluded from evidence. R. 782. Handlers on this page cite to "R. 441-442," which it develops, is a reference to plaintiffs' exhibits 19 and 20 for identification (R. 441 (O.P.), 442 (O.P.)) which were excluded from evidence. R. 782. Page 30 also refers to "defendants' exhibits P, Q, R and S." R. 498-99, 500, 501, 502-04. These exhibits were marked for identification by the attending notary public during the taking of the depositions of Kendall and Piowaty. R. 281(O.P.), 305

(O.P.), 329 (O.P.). The exhibits were neither offered in evidence by the parties, nor received in evidence by the district court.

Handlers on page 31 of their brief cite (1), to plaintiffs' exhibits 12 and 13 for identification (R. 371-74 (O.P.), 375-78 (O.P.)), (2), to "R. 257-262", a portion of the deposition of Kendall, and (3), to "R. 317-18", a portion of the deposition of Piowaty. As noted before, these exhibits and depositions were excluded from evidence. R. 782. Page 31, in addition, refers to plaintiffs' exhibits 17 and 21 for identification. R. 438-39 (O.P.), 443-44 (O.P.). These exhibits, also, are not in evidence. R. 782. Page 32 of handlers' brief for the statements there made, cites only the excluded deposition of Piowaty (R. 318-31 (O.P.), 782), and "R. 502," a reference to defendants' exhibit 8, an exhibit neither offered nor received in evidence. R. 502-04.

Similarly, the only citations to the record given on page 33 of handlers' brief are to the excluded deposition of Kendall. R. 251-314 (O.P.), 782. The reference "R. 438-439" on page 34 of the brief is to plaintiffs' exhibit 17 for identification (R. 438-39 (O.P.)), which was excluded from evidence. R. 782. Again, on page 38 of their brief, handlers cite the contents of plaintiffs' excluded exhibits 4, 7 and 25 for identification. R. 356-57 (O.P.), 361-62 (O.P.), R. 478-85 (O.P.), 782.

The Brief for Appellants on page 47 cites to plaintiffs' exhibits 12, 13, 17, and 21 for identification, which were excluded from evidence by the district court. R. 371-74 (O.P.), 375-78 (O.P.), 438-39 (O.P.), 443-44 (O.P.), 782. On page 64 of their brief, handlers cite to the excluded deposition of Harkness. R. 208-50 (O.P.), 782. Handlers at page 65 argue from matters

in plaintiffs' excluded exhibits 17 and 21 for identification. R. 438-39 (O.P.), 443-44 (O.P.), 782. Similarly, on page 66 of their brief, handlers allude to their excluded exhibits 16 and 25 for identification. R. 389-437 (O.P.), 478-85 (O.P.), 782. Handlers' brief on page 67 cites to plaintiffs' exhibit 17 for identification, an exhibit not in evidence. R. 438-39 (O.P.), 782.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California, EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Three-judge court

It is not clear whether appellees mean to urge that the case was not heard and determined by a three-judge court, or whether the contention is abandoned. (Appellees' brief, pp. 2-3.) If the contention may be regarded as still pending, appellants submit the following suggestions.

First, since appellees procured entry of the judgment appealed from and pray for affirmance of the judgment

by this court, they are hardly in a position to contend that the judgment is invalid.

Second, there is no basis in the record for an assertion that the honorable Judge Goodman, who died September 15, 1961, failed to participate in any of the determinations made by the district court. There is only the bare notation that because of his death on September 15, 1961 he was unable to *sign* the findings and orders dated September 20, 1961. (R. 777, 781, 783, 784.) The matters embraced in these orders were before the court for consideration a long time before the death of Judge Goodman, with nothing in the record to indicate inability of his honor to participate in the consideration and determination of these matters.

The "Memorandum and order" of the court, deciding the case, was handed down July 10, 1961. (R. 757.) Proposed findings of fact, conclusions of law, judgment order, and the anomalous document entitled "Order *re* motion to substitute and ruling on evidentiary matters" were submitted by appellees to counsel for appellants for approval or disapproval, then filed together with appellants' objections thereto on August 4, 1961. (R. 770.) A reply to appellants' objections was then filed by appellees on August 7, 1961. (R. 773.) Thus, all matters embraced in said documents submitted by appellants were before the court for consideration and determination 39 days before the death of Judge Goodman, with no suggestion of incapacity of his honor during this period, or of non-participation in any of the determinations embodied in the findings and orders signed by the two surviving judges on September 20 1961. (R. 777-784.)

Rulings on appellants' evidence

The main feature of appellees' brief is repetitious argument that the appellants rely upon evidence "not admitted" by the district court. This argument, so elaborately presented, is based entirely upon paragraphs 2 and 3 of the so-called "ruling" on evidentiary matters made contemporaneously with the final judgment. (R. 782, 783.) In this "ruling," it is stated that the depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, also plaintiffs' exhibits 1 through 20, "are not admitted into evidence, but have been considered by the court as an offer of proof by plaintiffs." Since the transcript of trial proceedings is devoid of any "offer of proof" by counsel for plaintiff on any subject, it is manifest that the foregoing post-trial assertion, whatever meaning it is intended to convey, is sheer fiction. This is readily apparent from examination of the record of trial proceedings.

The depositions of David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty, called as witnesses by appellants, and of R. M. Wimbish, called by appellees, were taken at Miami, Florida, January 21 to 23, 1958, pursuant to written stipulation that the depositions "are not being taken for purposes of discovery but are to be offered in evidence." (R. 144.)* Plaintiffs' exhibits 1 to 22 form part of these depositions. The completed depositions were filed March 14, 1958 and presented to the court for consideration by appellees in support of their dual motion to dis-

*The stipulation to take depositions is omitted in the printed record. (See Appellees' Brief pp. 45-46.)

miss the action. (R. 60-61, 98-99.) These depositions, thus opened and presented to the court on the initiative of appellees, without question as to validity *in toto*, or objection to any portions thereof, were freely cited in the presentation of appellees' motion. (See "Defendants' points and authorities in support of motion," R. 61-79, 100-117.)

The judgment order entered January 13, 1959, from which the prior appeal in this case was taken, recited:

> "This cause coming on for hearing on April 18, 1958, on defendants' motion to dismiss the action because the plaintiffs failed to allege facts showing a cause of action within the jurisdiction of the United States District Court, and the court having heard the argument of counsel, both written and oral, and having considered the depositions, affidavits, and exhibits presented by the parties hereto in connection with the hearing thereof, and the court being fully advised, it is by the court, this 13th day of January, 1959, ordered that said motion be granted, etc." (R. 125.)

On the appeal to this court, the depositions, including plaintiffs' exhibits 1 to 22, were part of the record upon which the case was considered and determined by this court, all without question as to the validity of the depositions or any portion thereof. (No. 49, October Term 1959, R. 112-447.)

At an early stage of the trial commencing February 7, 1961, in course of the examination of appellants' witness Dr. Paul L. Harding, appellants' counsel requested that a document identified by the witness be

marked plaintiffs' exhibit 23 for identification, whereupon the following occurred (R. 575):

"Judge Goodman: What is it? You want an identification number for some document?

Mr. Ferguson: 23.

Judge Goodman: One. It should be one.

Mr. Ferguson: Well, it would conflict with the numbers that appear in the record already. I think it would be more convenient to go on with that number series.

Judge Goodman: These are exhibit numbers of documents in the depositions?

Mr. Ferguson: Yes, your honor.

Judge Goodman: I suggest again to you, counsel, to offer your depositions in evidence, and then we will have a record of them. Don't you want to do that?

Mr. Ferguson: Certainly I do. I just question as to the time, as to when.

Judge Goodman: Well, we will make the time right now. Just offer them in evidence, what you want, and then we can get the next exhibit number. The depositions are all together, are they?

Mr. Fourt: We object, your honor, and we respectfully ask permission and request that they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay.

Judge Goodman. We will mark—do you wish to have the depositions marked?

Mr. Ferguson: Yes, your honor.

Judge Goodman: We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them.

Mr. Fourt: Thank you very much."

The matter of reading the depositions was adverted to again, in connection with the transcript to be furnished to the court. (R. 683.) First, the court requested that all of the oral testimony should be transcribed by the reporter. Then his honor Judge Halbert added the following (R. 683):

> "Judge Halbert: Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter.
>
> Mr. Fourt: No, your honor. We have reserved our right to object to each sentence as it is read into the record.
>
> Judge Halbert: I understand that, and furthermore there is no sense in copying this book here again into the record."

Judge Halbert's reference to "this book" relates to the printed record on the prior appeal, a copy of which was furnished to each member of the court at the commencement of the trial.

The discussion proceeded further, as follows (R. 684):

> "Mr. Fourt: The matter of the depositions we understand is not now in evidence.
>
> Judge Halbert: It is offered subject to your objections.

Judge Goodman: Subject to your objections, which you can present in your brief. . . . We may decide this case—I am not going to disclose the secret workings of our minds, but we may dispose of this case without any need of acting upon objections to depositions. We are not going to consider that unless it is necessary. If it is necessary, then we will have to have another hearing.

Mr. Fourt: If the court please, just allow us to raise our objections at this time.

Judge Halbert: You have got that already. We have told you that your objections stand to every word that is in these depositions here, and that if it becomes necessary for us to have another hearing I think we ought to, but I don't think there would be any useful purpose served by our sitting here hour after hour while these things are read to us, and you object to each word and phrase in the matter. As Judge Goodman has suggested, if we approach that and it becomes necessary we will have another hearing, but I don't want to do it now.

* * *

Mr. Fourt: Do I understand, sir, that the depositions are not now in evidence and that if the court desires to read them there will be another hearing?

Judge Goodman: They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary.

Mr. Fourt: Thank you, your honor." (R. 684-685.)

What happened subsequently was that appellants, in their post-trial brief (Appendix III), submitted argument on the matter of the admissibility of the deposition evidence, also plaintiffs' exhibits 23, 24, 25 and 26; appellees, in their reply brief filed April 26, 1961, argued at length their objections to the admissibility of various items of appellants' evidence; then appellants, in their closing memorandum filed May 19, 1961, answered in further detail all of appellees' objections.

The reason why appellants' trial court briefs are not part of the printed record, also why there is no argument in appellants' original brief on the subject of admissibility of evidence, is quite simple, namely, that the district court made no rulings on any of appellees' objections, thus leaving no question of admissibility of evidence to be raised or considered on this appeal. Instead, in the "Memorandum and Order" of July 10, 1961, the district court declared:

> "The evidence has been heard, with the ruling on certain objections by defendants having been reserved . . . The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible." (R. 758.)

The meaning of the word "*arguendo*" in the above context is quite enigmatic. However, whether *arguendo* or otherwise, the record is clear that the court considered and decided the case on the assumption that

all of the evidence to which appellees submitted objections was admisssible. Without more, the evidence assumed to be admissible for the purpose of the determination of the case made by the district court remains equally available for the determination of the case to be made on this appeal.

It is unabashedly asserted in appellees' brief (p. 9) that the district court, following the filing of trial briefs, ruled on the reserved objections of appellees to evidence introduced by appellants, citing R. 782. Manifestly, no ruling on any of appellees' objections is to be found at page 782 or anywhere else in the record. To illustrate, the general objection made by appellees to the admission of the depositions was that appellants made no showing that the deponents, who resided in towns south of Miami, Florida, were at a greater distance away from Sacramento, California, than 100 miles. (R. 726-727.) It would be astonishing, indeed, to find a ruling of the district court sustaining this objection. Nor are there rulings on the numerous detailed objections made by appellees to various items in the depositions.

As to plaintiffs' exhibits 23, 24, 25 and 26, these are records of the research on the subject of maturation and quality of the avocados grown in Florida conducted by Dr. Harding and his staff at the Orlando and Miami agricultural stations of the United States Department of Agriculture,—records made and kept by Dr. Harding and his assistants in the regular course of the performance of their duties as employees of the Department of Agriculture. (R. 568-569, 573, 583.) At page 49 of appellees' brief, it is stated that the

district court reserved ruling on the admissibility of these exhibits, "Having previously ruled such evidence to be immaterial," citing R. 574, 577. This is a flagrantly erroneous statement.

When Dr. Harding was asked to identify plaintiffs' exhibit 23 and to indicate the nature of its contents, the presiding judge interrupted as follows (R. 577):

> "Judge Goodman: Counsel, I am going to interrupt again. Your opponent once before objected to this." (The record reveals no such objection.) "We are not required in a three-judge court hearing in which is involved the validity of a state law to hear all kinds of evidence as you would if you were trying a case before a jury or an ordinary civil action. Only such evidence as is necessary to determine the question of the invalidity of the statute is all we need to hear. . . . .* We are not going to encumber the record with things like this. So I will sustain the objection that was made to this exhibit.
>
> Mr. Ferguson: I haven't offered it yet."
>
> Judge Goodman: I thought you had.
>
> Mr. Ferguson: I have to lay the foundation for the offer."

Subsequently, additional research records produced by Dr. Harding were marked for identification as plaintiffs' exhibits 24, 25 and 26 (R. 583); plaintiffs' exhibits 23, 24, 25 and 26 were then collectively offered

*This extraordinary pronouncement by the presiding judge to the effect that in a trial by a three-judge court, rather than by a single judge or judge and jury, only limited evidence need be heard, sheds light on the court's cavalier disposition of the issues of the case.

in evidence (R. 603); thereupon objection was made that the documents were hearsay and irrelevant (R. 610-611). No ruling was made on these objections when asserted, nor at any time thereafter. Instead, they were treated by the court in the same manner as the reserved objections to the depositions and the matters therein contained, as above recited. Had these exhibits been excluded, as stated in appellees' brief, there would of course have been no occasion for appellees to reassert and argue objections thereto in their post-trial brief. (R. 722-726.)

Reverting finally to paragraphs 2 and 3 of the so-called post-trial "Ruling on evidentiary matters" (R. 782), the declaration that the depositions and plaintiffs' exhibits "are not admitted" in evidence is in no sense a ruling on any of the objections made by appellees to the admissibility of evidence. Nor could such declaration serve to erase from the record the rulings at the trial receiving this evidence subject to appellees' objections. It is elementary that objections reserved and never ruled upon become a nullity and call for no consideration by a reviewing court. (See *Clauson v. United States*, 8 Cir., 60 F. 2d 694, headnote 4.)

Paradoxically, paragraphs 2 and 3 of the post-trial "Ruling on evidentiary matters" amounts to an affirmation in another form that the district court gave such consideration as it deemed requisite to the challenged evidence in its determination of the case. To say that the evidence was considered by the court as "offer of proof" is but another version of the statement in the court's opinion that the evidence was considered "arguendo." Whether considered "arguendo," or as fictitious "offer of proof," the evidence is now before

this court for such consideration as may be deemed appropriate, with no occasion to give attention to appellees' extensive argument on the subject of admissibility of evidence.

Appellees' criticism of regulations under federal marketing order

As stated in appellants' original brief (p. 34), appellees were permitted by the district court to interpose a defense challenging the integrity of the regulations issued by the Secretary of Agriculture under the Florida avocado marketing order, but withdrew this defense upon the trial of the case. (R. 119, 571.) This occurred after appellees had obtained and marked for identification the annual reports of the Avocado Administrative Committee, also a complete set of the minutes of meetings of the committee held from May 4, 1957 to December 10, 1957 (R. 187-190); also after counsel for appellees had cross-examined the witness David M. Biggar regarding the functioning of the committee (R. 176-192) and had taken the deposition of R. M. Wimbish regarding the manner in which the Florida avocados were inspected prior to shipment. (R. 332-351.)

Notwithstanding the abortive attempt to impugn the administration of the marketing order, appellees revert to the withdrawn defense in their brief filed in this court. At pages 15-16 and 38-42 of appellees' brief, the validity of the maturity regulations issued by the Secretary of Agriculture is questioned because these regulations followed the recommendations of the Avocado Administrative Committee, composed of growers and handlers of the Florida avocados. Quite vaguely, it is intimated that the marketing order is

duplicitious because it makes provision for exemptions or variances from the maturity regulations to be granted by the committee in conformity with rules to be approved by the Secretary (Sec. 969.53 of marketing order), also because daily shipments not exceeding 55 pounds (one bushel) and Christmas gift shipments not exceeding 20 pounds are exempted from the maturity regulations (pursuant to Sec. 969.55 of the marketing order, R. 28, 29). Another criticism is that although some avocados are grown commercially in "north Florida," these avocados are not included in the marketing order.

Passing the point of law that appellees have no standing to challenge the validity of the marketing order and the regulations issued thereunder,* the criticisms submitted by appellees are pointless. Although the Avocado Administrative Committee is charged with the duty of recommending to the Secretary the maturity regulations deemed proper, these recommendations are adopted at meetings of the committee attended by representatives of the Department of Agriculture and the committee is required to submit to the Secretary with each recommendation the data and information upon which it is based. (R. 27, 207.) Moreover, since the

*Orders issued by the Secretary of Agriculture under the Marketing Agreement Act can be challenged only by persons directly affected thereby, in proceedings to which the Secretary is a party. (See: *Stark v. Wickard*, 321 U. S. 288, 64 S. Ct. 559; also *United States v. Western Fruit Growers*, 9 Cir., 124 F. 2d 381; *La Verne Co-op Citrus Assn. v. United States*, 9 Cir., 143 F. 2d 415, 418; *Panno v. United States*, 9 Cir., 203 F. 2d 504; *Gudgel v. Iverson*, D.C. Ky., 87 F. Supp. 834, 841; *United States v. Superior Court of Los Angeles County*, 19 Cal. 2d 189, 197-198.)

growers and handlers of the fruit procured adoption of the marketing agreement in order to protect the Florida avocado industry from deterioration, it is absurd to suggest that the members of the Administrative Committee nominated by the growers and handlers and appointed by the Secretary of Agriculture would undermine the entire program of regulation by recommending false or inadequate regulations. Nor is there the least evidence that any of the regulations recommended by the committee did in fact result in the shipment of immature or low grade avocados.

The provision for exemption certificates does not dispense with the requirement of maturity, but provides for procedural rules pursuant to which it may be determined that some avocados of a particular variety have attained requisite maturity at a date earlier than anticipated when the applicable maturity regulation was promulgated. (R. 28.) Again, there is no evidence that the issuance of an exemption certificate, in any instance, resulted in the shipment of immature avocados. To question the exemption of small Christmas shipments, or of one bushel a day, is sheer triviality. And, as to avocados said to be produced commercially in "north Florida" and omitted from the marketing order, the existence of such avocados has escaped mention in the record of this case. If there are any such avocados, it is not explained by appellees how non-inclusion thereof in the marketing order renders the order defective.

Finding re "temptation" to market immature avocados

Finding of fact No. 4 (R. 779), echoing what is said in the district court's opinion (R. 759), declares that "There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high." This sapient commentary on human nature, submitted as a "finding of fact," is not derived from any evidence applicable to the current marketing of avocados by appellants or others. However, it is because prior to the adoption of the federal marketing agreement some growers and handlers of Florida avocados were marketing immature or low grade avocados, whether inadvertently or because of "temptation," that at least two-thirds of the producers of Florida avocados (in number, or in volume of production) and at least 50% of the handlers of Florida avocados desired to be protected from the detrimental effect on the growing industry of shipments of immature or inferior avocados, therefore requested the Secretary of Agriculture to enter into a marketing agreement under which shipment of immature or inferior avocados from the Florida production area would be effectively barred.

The record of this case is devoid of any evidence indicating that at any time since June 11, 1954, when the Florida avocado order went into effect, any growers or handlers of Florida avocados have knowingly sought to market sub-standard avocados. The withdrawal of appellees' attempted impeachment of the administration of the marketing order ("fifth defense," R. 119, 571) is in effect an admission that no im-

mature or otherwise substandard avocados have in fact been shipped from Florida since the marketing order became effective.

If regarded as a "finding of fact," the district court's cynical animadversion upon the susceptibility of the growers of avocados to temptation has no vestige of support in evidence applicable to appellants or other present-day growers and handlers of Florida avocados, therefore merits no consideration by this court. (*United States v. Gypsum Co.*, 333 U. S. 364, 393-399, 68 S. Ct. 525, 541-544; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 658, 65 S. Ct. 870, 874.)

Oil content of Florida avocados

The subject of oil content of the Florida avocados and the relation of such oil content to maturity and palatability,—as to which the district court made findings Nos. 5, 6 and 11 (R. 779-780),—is fully discussed in appellants' original brief (pp. 9-30) and this discussion will not be here repeated. Attention will be limited to examples of the argument submitted in appellees' brief in an endeavor to justify the district court's findings.

Appellees urge (brief p. 7) that because of the close relationship between oil content and the maturation of the fruit, oil content has been found to be the best available index of the maturity of the avocado, citing R. 628-29, 648, 666, and finding No. 5 at R. 779. The references are, first, to a statement of opinion by H. W. Poulsen, Chief of the Division of the Standardization and Inspection Services of the California Department of Agriculture, who professed no knowledge whatever regarding the characteristics of the avocados

grown in Florida other than the fact that it was reported to him that some of the avocados shipped from Florida to California were rejected for sale in California because they did not test 8% oil content. (R. 639-640.) Even as to California avocados, Mr. Poulsen's knowledge was merely that they became legally "mature" when they tested 8% oil content, even though of varieties that attain 15% to 20% oil content, or even higher. (R. 635.) He knew also that the leading varieties of Florida avocados are not grown commercially in California, namely, the Lula, Waldin, Booth 7, Booth 8, or other Booth varieties. (R. 636.)

Next, appellees refer to a statement of opinion by Dr. David Appleman, who testified merely that he had familiarity with only two varieties of California avocados, the Fuerte and Hass, because he had made use of these avocados as material in certain biochemical research which had nothing to do with maturity or edibility of the fruit. (R. 564.) As to Florida avocados, Dr. Appleman frankly stated: "I don't know anything at all about Florida avocados." (R. 658.)*

Appellees refer, finally, to the testimony of Presley Wiggs, an officer of Calavo Growers of California. (Brief, p. 666.) Again, the testimony is a bare statement of opinion that "The 8% oil content is effective in keeping immature fruit off the market." Like Mr.

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*Dr. Appleman also admitted that he had not during recent years read any writings on the subject of maturation of avocados, not even the writings of Dr. Sinclair and Dr. Bean, who for several years have been engaged in the study of maturation of avocados at the Citrus Experiment Station of the University of California at Riverside, California. (R. 654-655.) It is indeed significant that these scientists, currently engaged in study of the subject and available to appellees as witnesses, were slighted in favor of Dr. Appleman.

Poulsen and Dr. Appleman, Mr. Wiggs claimed no knowledge of the Florida avocados, except that he had for a period of years been in charge of the sales offices of Calavo in San Antonio, Dallas, Houston and Juarez, and that Calavo had sold Florida avocados in this territory. Mr. Wiggs testified that from about 1939 to 1957 Calavo sold Florida avocados in large volume throughout the country; that this included sales of the West Indian varieties with oil content well below 8%, except in California. (R. 667-669.) As to any and all varieties of Florida avocados sold by Calavo, there is no suggestion in the testimony of Mr. Wiggs that Calavo concerned itself with the percentage of oil content of the fruit in any state other than California.

On the basis of the foregoing references to the record and nothing more, appellees argue that "The findings of the district court with respect to the economics of avocado marketing and the biology of the avocado depended upon the credibility of the expert witnesses produced by each party at the trial," and that the court found the evidence on behalf of appellees entitled to greater weight. (Brief, p. 19.) Since the only evidence of expert witnesses on the subject of maturation and palatability of the avocados grown in Florida, the only avocados within the issues of this case, is that of appellants' witnesses Dr. Roy W. Harkness and Dr. Paul L. Harding, there is here no conflict of expert evidence and no occasion to resolve any such conflict on the basis of comparative credibility of the witnesses. Instead, the district court and appellees chose to disregard entirely the testimony of appellants' witnesses, except for certain shocking distortions of this testimony in appellees' brief.

One example of the calibre of appellees' argument on the subject of oil content of Florida avocados is the quotation from the deposition of Dr. Harkness of a sentence appearing at page 215 of the record, *viz.*: "The Waldins did not reach eight percent, let's say, until December, which is the normal time for picking Waldins." (Brief, p. 29, footnote.) The record of this case shows over and over again that the Waldins are avocados of West Indian antecessors, which come to maturity and are picked and marketed in August and September, with negligible holdovers in the forepart of October. (R. 356, 360, 361, 364, 379, 590.) The many hundreds of oil tests made by Dr. Harkness (R. 289-430) show no oil tests of Waldins later than the months of July, August and September, except a single test as late as October 6 at 6.5% oil content. (R. 390, 391, 392, 393, 394, 395, 397, 409, 410.) Manifestly, the sentence quoted from the deposition of Dr. Harkness, to the effect that the normal time for picking Waldins is December, is a palpable error of reporting or transcription, overlooked before the deposition was filed, yet it finds place in appellees' brief.

Of like calibre is the assertion that Dr. Harding testified that the hybrid and Guatemalan varieties of Florida avocados attain oil content as high as 20% while still in prime marketing condition. (Brief, pp. 7 and 25, citing R. 577.) The reference is to an answer made by Dr. Harding to a question propounded by Judge Halbert, not with respect to any of the varieties of avocados grown in Florida, but instead expressly directing the witness to state the minimum and maximum oil content of avocados, "I don't care

whether they are in Florida, California, Michigan or South America or where they are." To this question the witness first answered 1% to 20%. (R. 576.) Upon further questioning by Judge Halbert, Dr. Harding stated that the West Indian varieties of avocados have oil content of 3% to 4% or even 5% when they are mature and ripe. Judge Halbert then repeated:

> "Dr. Harding, I am not talking about varieties, I am talking about an avocado that is ripe, the least amount of oil that you would find in such an avocado. I don't care where it comes from, what kind it is, its size, shape, color or anything else."
>
> A. If you are talking about the minimum, I would say that avocados are acceptable and palatable at 2 and 3 percent as a minimum.
>
> Q. All right. Now, what is the maximum that avocados may contain and still be marketable and palatable?
>
> A. I have only experience in Florida, therefore I can answer your question somewhere around 15 to 20 percent." (R. 577.)

Subsequently, Judge Halbert interrogated Dr. Harding specifically about the oil content of the varieties of avocados grown in Florida, whereupon the witness testified that some 44 varieties are regulated under the marketing order and that of these only half a dozen have 8% oil content when they mature; that late in the season the Lula would average 8%, perhaps the Booth 8 in very late season, likewise the Booth 7, also three very minor varieties; that most Lulas and Booth 8s—by far the two leading varieties—would reach 8% oil content some time in their lifetime if left on the

tree, but these avocados may be picked long before they reach 8%; that perhaps the last 20% of the shipment of these avocados may meet the 8%; that in the case of the Waldin, before the 8% is reached, you would probably have all your crop drop, and in the case of the Booth 8 you would probably shorten the season far beyond what it should be shortened; the same way with some of the other varieties, they would be overripe and wouldn't have the carrying qualities. (R. 616-620.)

To mention but one other example of appellees' argument, reference is made in appellees' brief (footnotes, pp. 26 and 27) to a writing by Dr. Stahl, published in 1933, regarding certain research conducted by him in the years 1929 to 1931 on the subject of maturation of some unidentified varieties of Florida avocados. In the stipulation to take depositions in Florida, the name of Dr. Stahl was included as a possible witness and it may be assumed that he would have been called to testify if he had any data or opinions of current relevancy to offer.

All that appears in the trial record regarding the contents of Dr. Stahl's writing is the following cross-examination of Dr. Harding by appellees' counsel (R. 607-608):

> "Q. Doctor, would you agree with this statement of Dr. Stahl in the 'Changes in composition of Florida avocados in relation to maturity,' in May 1933, quote: 'The fat and oil of the avocado, of course, is its chief constituent other than water, and when it has reached its maximum there is no doubt that the fruit is mature?'

A. There wouldn't be any question there, because when it reaches its maximum, why, that would be even overripe, sir.

Q. Would you agree with this statement, quote: 'That fat content seems to be the best indication of maturity of the avocado; this can be very readily correlated with the maturity of the fruit?'

A. I wouldn't agree with that statement, sir.

Q. Would you say, then, that there is a difference of opinion between yourself and Mr. Stahl?

A. I would say on that point there is a very definite reason for change of opinion."

The answers of Dr. Harding, not the questions, constitute evidence in the case. In face of what appears in the trial record, the citations made by appellees of extracts from Dr. Stahl's 1933 publication are of dubious propriety and of no probative value.

Conflict between state and federal regulation: Parker v. Brown, 317 U. S. 341

Appellees say that comparison of the federal and state statutes here involved show that no conflict *per se* exists between them, citing *Parker v. Brown*, 317 U. S. 341. (Brief, p. 34.) Apparently, the meaning intended to be conveyed by appellees' statement is that both statutes may be simultaneously enforced, in all applications thereof, without conflict, since it is further argued that the objective in enacting the federal statute was to establish orderly marketing conditions for agricultural commodities in interstate commerce in order to achieve "parity prices" for such commodities, whereas there is nothing in California's Standardization Act about parity prices. Even if this were all, yet if the

achievement of "parity prices" called for regulation of the quality of the subject commodities by the federal government, simultaneous regulation of quality of the same commodities under state law would offend against the Supremacy Clause of the United States Constitution.

However, the matter is made explicit by Sec. 602 (3) of the federal statute (Appellants' original brief, p. 89), deliberately omitted in appellees' brief (see p. 55) and ignored in appellee's argument. By Sec. 602 (3), independently of all provisions of the statute relating to maintenance of parity prices for the subject commodities, it was declared to be the policy of Congress, through the exercise of the powers conferred upon the Secretary of Agriculture by the statute, "to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest."

In *Parker v. Brown*, the matter in controversy was the enforcibility of a proration marketing program for the 1940 crop of raisins grown in California, adopted pursuant to the California Agricultural Prorate Act of June 5, 1933. The validity of the statute was challenged as in violation of the Commerce Clause of the United States Constitution and of the Sherman Act; also, as in conflict with the Agricultural Marketing Agreement Act of 1937. With respect to the alleged conflict between the state act and the federal act, this court held that such conflict did not exist in the absence of a concurrent marketing program for the Cali-

fornia raisins under the federal act. The court stated: "We may assume also that a stabilization program adopted under the Marketing Agreement Act would supersede the state act." (317 U. S. at p. 353.)*

It is of incidental interest to note that in the California statute authorizing the Director of Agriculture to issue orders regulating the marketing of agricultural commodities, as amended in 1961,** it is provided as follows:

"Agricultural Code, Sec. 1300.15(13c):

> In addition to authority to issue marketing orders regulating the processing or preparation for marketing of any or all portions of any agricultural commodity processed within this State, and in addition to authority to issue marketing orders regulating the distribution of any and all portions of any agricultural commodity within this State and subject to the legislative restrictions and limitations of Section 1300.14 of this chapter, the director may also issue marketing orders regulating the handling, processing, preparation for marketing or marketing of any or all portions of any agricultural commodity produced in this State for

*Regarding the contention made in *Parker v. Brown* that the state act was in violation of the Commerce Clause even without implementing federal legislation of any kind, this court held that the challenged state regulation applied wholly to intrastate commerce and not to interstate commerce. In the present case, the opposite is true. The challenge of appellants is to the application of the state regulation to the interstate marketing of the Florida avocados. (See the comprehensive analysis of the decision in *Parker v. Brown* made in the treatise of M. Ramaswamy on "The Commerce Clause in the Constitution of the United States," pp. 259-268.)

**Stats. 1961 ch 147 § 1, 1961 Supplement to Deering's Agricultural Code of California, p. 113.

which marketing regulatory powers are not being exercised by the federal government under the provisions of the Marketing Agreement Act of 1937, as amended, Public Law No. 137, 75th Congress, Chapter 296, First Session, 7 U.S.C.A. 674, 50 Statute 249."

Conclusion

It may fairly be said, it is submitted, that on the merits appellants' case is virtually uncontested. Two tangential and essentially pointless defenses are relied upon by appellees, first, that the 8% oil requirement for sale of avocados in California has been of benefit to the avocado industry of California, in that it has kept immature avocados off the market, and second, that in any event it would be commercially inexpedient to market the West Indian varieties of Florida avocados in California.

Since by far the greater part of the California avocado crop consists of avocados that come to market with 15% to 20%, or even higher oil content, notably the two dominant varieties, the Fuerte and Hass, the 8% oil requirement obviously is a decidedly minor factor in the marketing of the California avocados. With all the official records at hand, appellees submitted no evidence in support of their contention, only bare assertion of an unsupported conclusion by appellees' witness H. W. Poulsen, who could not name a single variety of California avocados that has difficulty in meeting the 8% oil standard (R. 631-632), a conclusion repeated by appellees' witness Presley Wiggs likewise without supporting evidence (R. 666). Although these assertions were received as expression of "opini-

on," it is not apparent how they fit into any category of expert testimony.

What is certain about the effect of the 8% oil requirement is that it has operated as a nearly complete embargo against the marketing of the Florida avocados in California, to the commercial advantage of the growers and handlers of the California avocados. Such local commercial benefit cannot validate obstruction of the freedom of interstate commerce.

As to the commercial practicability of marketing the West Indian varieties of Florida avocados in California, the cross-examination of appellees' witnesses Presley Wiggs and Albert C. Jones exposes the vacuous nature of this defense. (Appellants' original brief, pp. 36-38.) West Indian avocados from Florida, also in former years from Cuba, have been marketed over the years in the United States at distances as great or greater than the distance from South Florida to California. (See also, plaintiffs' exhibits 5 and 8, R. 358, 363.)

It is submitted, accordingly, that appellants have established their case by the overwhelming weight of the evidence,—evidence uncontradicted and unimpeached in any particular,—and that on the facts and the law the judgment of the district court should be reversed and appellants should be granted the relief prayed in their complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962
No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California, EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' PETITION FOR REHEARING.

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APPELLANTS' PETITION FOR REHEARING.

Admission of Evidence.

It is respectfully submitted that a grievous burden is unjustifiedly imposed on the appellants by the judgment of the court if in truth there is abundant evidence in the record on this appeal, properly available for consideration by this court, that interstate commerce is impermissibly restricted by application of Sec. 792 of California's Agricultural Code to debar from sale in that state avocados grown in Florida which of their nature have less than 8% oil content but are nevertheless

mature and wholesome. Appellants therefore entreat the court, as a preliminary to appraisal of the grounds of this petition, again to scan the record on appeal in order to determine what evidence is properly before the court as a basis for adjudication of appellants' complaint.

As stated by the court, only one witness for the appellants testified at the trial held February 7 and 8, 1961 in Sacramento. Four other witnesses for appellants testified by depositions taken in Miami on January 21 and 22, 1958, namely, David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty [R. 144-332; also Pltf. Exs. 1 to 22 identified by these witnesses, R. 353-445] and it is apparent that no effect is given to this testimony in the opinion of the court. It is said that this testimony was not "formally admitted" and that "For this court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections" (p. 23).*

*Footnote 21, appurtenant to the quoted sentence, does not call attention to any of appellees' objections to the admissibility of the depositions or any of the exhibits. Instead, it refers to evidentiary matter injected into appellees' post-trial brief, designated as an "offer of proof," alleged to show that the oil tests of Florida avocados made by Dr. Harkness did not reveal the full oil content of the fruit. [R. 707-708, 748-756.] Manifestly, the argument based on this unsworn evidentiary matter, with no opportunity for cross-examination or submission of counter-testimony, was not an objection to the *admissibility* of the testimony of Dr. Harkness, in whole or in part. In contrast, Dr. Harkness was cross-examined at length by counsel for appellees regarding the oil tests of avocados made at the University of Florida Sub-Tropical Experiment Station, the method used and the accuracy of the results. [R. 219-247, particularly pp. 243-246.]

Appellants respectfully submit that notwithstanding informality in the trial proceedings, or ambiguity in the record because of certain statements made by members of the trial court, or because of the post-trial "Ruling on evidentiary matters," appellants' depositions and exhibits form part of the evidence properly to be considered and acted upon by this court. Attention is directed, in particular, to the following incidents in the trial court proceedings:

R. 575-576: Appellants' depositions offered in evidence; request by appellees' counsel that the depositions be read, stating that "We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay." Response by presiding judge: "We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them."*

R. 576: Exhibit identified by Dr. Harding marked Plaintiffs' 23 for identification, following the last exhibit number in the depositions.

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*It is to be noted that the only objection ever made to the depositions in entirety was that no proof was made that the witnesses were at a greater distance than 100 miles from the place of trial. [R. 706, 726-727.] Aside from judicial knowledge that the distance between Sacramento and towns south of Miami is more than 100 miles, the record shows that the depositions were taken pursuant to stipulation and were initially invoked by appellees on their motion to dismiss the complaint filed March 14, 1958. [R. 60-61, 98-99.] As to the specific objections, appellees were afforded unrestricted opportunity to present and argue all objections to the depositions, at the time and in the manner directed by the court. It is not suggested that reading of depositions line by line in open court is a prerequisite formality to admission in evidence.

R. 603: Plaintiffs' Exhibits 23, 24, 25 and 26, identified by Dr. Harding, offered in evidence; ruling reserved.

R. 683: Discussion of the transcript of the evidence to be furnished to the court, statement by Judge Halbert: "All of the testimony and all of the stipulations and all of the references to evidence should be written up and transcribed by the reporter, but no documents nor printed material (need) be included in that record. It can be referred to as an exhibit. Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter." Mr. Fourt: "No, your honor. We have reserved our right to object to each sentence as it is read into the record." Judge Halbert: "I understand that, and furthermore there is no sense in copying this book here again into the record," referring to the printed record on the prior appeal in this case, containing the full text of the depositions and annexed exhibits.

R. 685: Mr. Fourt: "Do I understand, sir, that the depositions are not now in evidence and that if the court desires to read them there will be another hearing?" Judge Goodman: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary."

Thus, at the termination of the hearing, there is reiteration of the ruling that the depositions are in evidence, both by Judge Halbert [R. 683] and by Judge Goodman. [R. 685.] There is the statement, in var-

ious forms, that the court has received appellees' written objections to the depositions and appellants' exhibits, to be argued in the post-trial briefs and to be ruled on if deemed necessary. Counsel for appellees acquiesced in this procedure. [R. 685.]

R. 700-756: In the post-trial briefs of the parties, extensive argument was submitted on appellees' objections to the admissibility of the depositions, also plaintiffs' Exhibits 1 to 22 forming part of the depositions and plaintiffs' Exhibits 23 to 26 submitted as part of the testimony of Dr. Harding. Only appellees' argument appears in the printed record on appeal.*

R. 758: Then follows the declaration in the court's Memorandum and Order of July 10, 1961: "The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. * * * We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible." Certainly there is nothing in this declaration to cancel the rulings made at the trial admitting appellants' depositions and exhibits in evidence. Quite the contrary, it is appellees' objections, not any part of the challenged evidence, that is thus summarily swept aside.

That the court chose to make a wholesale disposition of appellees' reserved objections to the admissibility of evidence by an assumption of admissibility, in lieu of a series of specific rulings on each challenged item, does not change the effect of the court's action. The

*Appellants' answer to appellees' objections is not included in the printed record for the obvious reason that there were no rulings on admissibility of evidence to be reviewed.

challenged evidence, appellants submit, remained part of the record of the case for such consideration as the trial court might deem essential.

It is manifest that the court's action was not due to a determination that the challenged evidence was rendered immaterial by some principle of law, since both the court's opinion and the challenged evidence deal with the same subject matter, that is, the oil content of the Florida avocados in relation to California's 8% oil content requirement. The fact that appellees' counsel chose to ignore the challenged evidence in his argument on this appeal, as stated in the opinion of this court (p. 22), either because of an assumption that the evidence was not admitted or for any other reason, seems immaterial.

R. 782: We come, finally, to the anomalous and self-contradictory post-trial "Ruling on evidentiary matters" made on the same date as the "Findings of fact," "Conclusions of law," and "Judgment." The "ruling" is that all of the depositions and all of appellants' exhibits are not admitted in evidence, but have been considered by the court as an offer of proof. No "offer of proof" was ever made by appellants of this evidence, or any item thereof. There was no rejection of evidence calling for an "offer of proof." The fiction of an "offer of proof" was contrived in a lame attempt to account for the fact that the challenged evidence was held available for consideration by the court in passing upon the case, notwithstanding appellees' reserved objections. It was not in truth non-admitted evidence, as the record of the trial proceedings clearly shows, no matter how cavalierly dealt with by the court.

There is, indeed, ambiguity in the self-annulling post-trial "ruling on evidence." But to penalize the appellants for this ambiguity by sending the case back for what may be a needless new trial, rather than to disregard the ambiguity as immaterial, seems a harsh miscarriage of justice. On the other hand, no injustice to appellees is involved in a reconsideration of the case by this court in the light of all the evidence actually admitted and available for consideration by the trial court. Appellees, although first demurring, acquiesced in the disposition of their objections in the manner chosen by the court. [R. 576, 683-685.] At no time was counsel for appellees restricted in cross-examination of appellants' witnesses, or in the introduction of evidence aimed to meet the oral and documentary evidence introduced by appellants. In fact, much of the evidence introduced by appellees was of its nature intended to detract from the force of what is now asserted to be non-admitted evidence.*

*The entire testimony of Presley Wiggs [R. 663-675], Albert C. Jones [R. 675-679], S. R. Whipple [R. 679-681], at least in part the testimony of Dr. David Appleman [R. 647-663], Defendants' Exhibit E [R. 488-492.]. In the opinion of this court (p. 19, footnote 17) quotation is made from the deposition of R. M. Wimbish [R. 332-351], taken by appellees at the same time and place and under the same stipulation as appellants' depositions, to the effect that the regulations under the Florida avocado marketing agreement are made by the Avocado Administrative Committee. The quotation is preceded by a parenthetical statement that the court did not rule on the admissibility of the Wimbish deposition. The record indicates that the offer of the depositions made by appellants was taken to include the Wimbish deposition as well as the four other depositions and that the ruling admitting the depositions subject to later consideration of appellees' objections was applicable to the Wimbish deposition. [R. 575-576, 684, 685.] If this were not the understanding,

When the court arrived at its decision upon the assumption that all of the challenged evidence was admissible, thus shunting aside all of appellees' reserved objections, appellees acquiesced in this disposition of their objections by failing to press the objections to the point of specific rulings on each item and thereby permitted the objections to lapse.* The post-trial asseration that the challenged evidence, *in toto*, was not admitted, in face of the reiterated rulings at the trial to the contrary, was in no sense a ruling on any of appellees' objections, already disposed of by assumption of admissibility. That the assumption was said to be made "*arguendo*" left it none the less in full effect, since it was not followed by rulings sustaining any of the objections. Had there been such rulings, appellants could have sought opportunity to introduce other evidence that would have cured the objections, or other evidence to replace evidence that might be ruled inadmissible.

Appellants submit, accordingly, that this court is not obligated to heed appellees' lapsed objections to appellants' evidence in the consideration of the issues

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appellees would not have filed and argued objections to the Wimbish deposition. [R. 700, 726-727.]

Incidentally, the quotation from the Wimbish deposition overlooks the fact that the Avocado Administrative Committee announcement and enforcement of regulations followed issuance of the regulations by the Secretary of Agriculture and publication in the Federal Register.

**Clauson v. United States*, 8 Cir., 60 F. 2d 604, headnote 4; *Grove Laboratories v. Brewer & Co.*, 1 Cir., 103 F. 2d 175, 178; *Dale Benz, Inc. v. American Casualty Co.*, 9 Cir. 305 F. 2d 641, 642-643; *Clopton v. Clopton*, 162 Cal. 27, 121 Pac. 720, 722; *De Tray v. Higgins*, 31 Cal. App 2d 482, 88 P. 2d 241, 243-244; *Wilson v. Dalton's Adm'r.*, 311 Ky. 285, 223 S. W. 2d 978, 981.

on this appeal; that all of the evidence made part of the record in the trial court, and there given such attention as the court deemed worthy, is properly before this court for such consideration as the court may deem pertinent to the issues to be adjudicated; that otherwise fundamental questions of constitutionality may be decided upon fallacious declarations of fact, to the detriment of the national welfare as well as to appellants.

GROUNDS FOR REHEARING.

I.

The holding that appellants have not sustained their claim that debarment from sale in California of Avocados grown in Florida, by application of section 792 of the agricultural code of California, after certification of the Florida fruit as of requisite maturity and quality for interstate commerce under the federal marketing agreement act, fails to give due effect to the Supremacy Clause of the United States Constitution.

Appellants presume to add to the dissenting opinion only a reminder to the court of the enormous scope and importance of the marketing agreement role in the national program to protect and promote agriculture. (Appellants' Jurisdictional Statement, p. 14.) Establishment of maturity and quality standards to govern the interstate marketing of agricultural products is a special feature of many of the federal marketing agreements—the sole component of the Florida avocado agreement as adopted in 1954. To permit California to hold for naught the federal regulation of interstate marketing of the Florida avocados, well over 90% of

which must be marketed outside the state if the industry is to survive, is to undermine the effectiveness of a most vital national program.

To suggest that conflict between the federal regulation and the state regulation is not inevitable, that the rejections of Florida avocados in California might have been avoided by leaving the fruit on the trees beyond the earliest picking dates permitted by the federal regulations, and that "Nothing in the record contradicts that suggestion," is indeed astonishing. First, the record shows without contradiction that because of the 8% oil requirement substantially all of the Florida avocados shipped to California were of but one variety out of the 40-plus varieties grown in Florida, namely, the Lula variety; that no period of waiting beyond the commencement of the normal marketing period could have qualified any appreciable portion of other leading varieties for sale in California, notably the hybrid Booth 8S and Booth 7S [accounting respectively for 27.24% and 12.95% of the 1959-1960 crop, R. 492]; that of the Lula avocados shipped to California, large loads were rejected on dates a month to two months after the commencement of the normal marketing period for this variety [R. 438, 443]; that the oil content tests of Lula avocados made at the University of Florida Sub-Tropical Experiment Station in Homestead to ascertain whether shipments to California might be ventured continued to show less than 8% oil content five to eight weeks after the earliest permitted picking dates [R. 371-378]; that the hundreds of oil tests of Lula avocados made by Dr. Harkness, in his research project on avocado maturity standards, showed predominantly less than 8% oil content all through November

and into December [R. 389-437, summarized in Appellants' Brief at p. 15]; that the oil tests of more than 5,000 avocados made particularly in the 1955-1956 season by Dr. Harding and his staff at the research station of the United States Department of Agriculture at Miami shows incidentally the amount of the oil content of the leading varieties of Florida avocados in relation to the earliest permissible picking dates and demonstrates that practically none of the great number of avocados tested attained 8% oil content until well past the earliest picking dates. [R. 479-485, summarized in appellants' brief at pp. 23-29.]*

There is not a word of evidence that any of the Florida avocados, at the time permitted to be marketed under federal regulations, were then in truth immature or otherwise prone to deceive potential consumers in California. Yet by the decision of this court the officers of California are authorized to ban these avocados from sale in California until, if ever, they attain 8% oil content. Such second test of maturity cannot be characterized as "higher" than that imposed under federal law in the absence of evidence impugning the integrity of the federal certification of maturity. Overlooked in the court's opinion is the fact that appellees withdrew their defense that the standards of quality and maturity promulgated under the Florida avocado marketing order, and the methods and procedures used in the administration thereof, are unreasonable, arbitrary and invalid. [R. 119, 571.]

To limit the inevitability of conflict between the federal and state regulation to the West Indian vari-

*See also the oral testimony of Dr. Harding at R. 619-620; also of Harold Kendall at R. 269-272.

eties of the Florida avocados, and then to palliate this measure of conflict by declaring this portion of the Florida crop unmerchantable in California, is not only factually untenable (Appellants' Brief, pp. 35-38, 63-64), but also introduces into the Supremacy Clause a tolerance that leaves it flaccid. The Supremacy Clause, it is most earnestly urged, was hardly intended to be so pliant.

II.

There is ample evidence in the record on this appeal, properly to be considered by the court, that application of section 792 of the agricultural code of California to bar sale in that state of avocados produced in Florida, solely on the ground that such avocados have less than 8% oil content, unreasonably restricts and discriminates against interstate commerce.

Appellants submit that upon re-examination of the record, particularly the comprehensive data showing the oil content of the avocados grown in Florida in relation to the California 8% oil requirement (summarized in Appellants' Brief at pp. 10-34, 62-69), it will become apparent that a new trial is not needed to make a determination of appellants' complaint under the Commerce Clause of the Constitution.

To cite but one illustration, it is noted in the court's opinion, by reference to an affidavit made March 3, 1958 by S. R. Whipple, Chief of the Bureau of Fruit and Vegetable Standardization in the California Department of Agriculture, that out of a total of 230,100 flats of avocados shipped from Florida to California from October 1, 1954 to December 31, 1957,

6.4% were rejected because they failed to pass the 8% oil test. [R. 79-81.] This is by no means the full measure of the exclusion of the Florida avocados from the California market by application of the 8% oil test. Far more significant is the fact that the shipments of Florida avocados to California in the period mentioned in the affidavit amounted only to about 3.8% of the total shipments of Florida avocados in the same period.* This indicates the drastic extent to which the 8% oil requirement has barred the Florida avocados from the most favorable market for this fruit in the United States—the state in which about as many avocados are consumed as in all the other states together. (Appellants' Brief, pp. 19-20.)

Appellants submit that it is unjust to impose upon them—in the sixth year of this lawsuit and upon second appeal to this court—the further burden and delay of a new trial to reintroduce evidence to prove what is overwhelmingly established by evidence available for consideration on this appeal; that neither use of the equivocal word "*arguendo*" in the opinion of the District Court, nor the fanciful post-trial pronouncement that substantially all of appellants' evidence is "not admitted," although actually received in evidence and made part of the record subject to objections never ruled upon, stands in the way of consideration of this evidence upon this appeal.

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*The record shows the total shipments of Florida avocados in the last three of the crop seasons mentioned in the affidavit, as follows: 516,103 bushels in the 1955-56 season, 439,419 bushels in the 1956-57 season, 364,616 bushels in the 1957-58 season to December 28, 1957 [R. 357, 362, 368], equivalent to 4,620,483 flats [at 3½ flats per bushels, R. 502] as against the total of 171,600 flats said to have been shipped to California in this period.

III.

The court's holding that application of California's 8% oil standard of maturity to the avocados imported from Florida is not a denial of the equal protection of the laws fails to give effect to the evidence that this standard is discriminatory when applied as a determinant of the maturity of avocados that of their nature attain maturity with less than 8% oil content.

The fact that the 8% oil standard is applied to the avocados grown in California, as well as those grown in Florida, and that in some past years California growers have experienced difficulty in meeting the oil test (Opinion, footnote 19), does not negate the discriminatory effect of application of the oil standard to the Florida avocados. The basis of judgment, it is submitted, is the practical effect of the challenged standard in relation to present-day circumstances and horticultural science.

In footnote 19 of the court's opinion, reference is made to statements that in some past years the 8% oil standard has resulted in rejection of shipments of California avocados. In more recent years, by new plantings, two varieties of California avocados—the Fuerte and Hass, both of very high oil content [R. 660]—have come to account for 80% or more of the California crop, while many of the varieties extant in earlier years are no longer produced commercially. If California growers of some varieties of avocados still have difficulty in meeting the 8% oil test, this does not militate against the right of the growers of Florida avocados to market their fruit promptly upon attainment of

maturity by a standard appropriate to the nature of the fruit, not a standard without horticultural validity in application to this fruit. [R. 618-620.]

Conclusion.

Upon the grounds aforesaid, appellants petition the court to grant a rehearing of their appeal, and upon such rehearing to adjudge that appellants are entitled to the relief prayed in their complaint.

Respectfully submitted,

ISAAC E. FERGUSON,
Attorney for Appellants.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.
May 29, 1963.

ISAAC E. FERGUSON,
Counsel for Appellants.